[redacted]

[redacted] COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 232

THE NEWARK NATURAL GAS AND FUEL CO.,
Plaintiff in Error,

vs.

THE CITY OF NEWARK, OHIO, Defendant in Error.

[redacted] BRIEF OF DEFENDANT IN ERROR IN OPPOSITION TO PETITION TO ADVANCE DOCKET.

EDWARD FISHER,
RALPH MORPHY,
FRANK A. HOWARD,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 615.

THE NEWARK NATURAL GAS AND FUEL COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEWARK, OHIO, DEFENDANT IN ERROR.

REPLY BRIEF ON MOTION TO DISMISS OR AFFIRM OR TRANSFER TO SUMMARY DOCKET.

May it please the Honorable the Supreme Court of the United States:

For the first time in the history of this case are we met by the claim of plaintiff in error that The Newark Natural Gas & Fuel Company and The Logan Natural Gas & Fuel Company are one and the same corporation, or are allied, or are under the same management.

Counsel for plaintiff in error say, on page 6 of the brief:

> "These two companies were allied under the same management, and together performed the function of the production, transportation and distribution of the product under a contract," etc.

This case from the beginning has been tried upon the theory that the two companies were wholly independent of each other; that the Newark Company was a distributing company only, and purchased its gas at a fixed price and distributed the same. Indeed, the plaintiff in error, in its printed brief in the Supreme Court in this case, made these claims. On page 2 of said brief:

> "The said defendant (The Newark Natural Gas & Fuel Company) is solely a distributing company, and not a producer of natural gas, and in 1903-4 had entered into a certain contract with The Logan Natural Gas & Fuel Company, a producing company, for a period of ten years, to supply it with gas at the corporation line of said city; that said contract was nearing expiration as to time, and could not again be renewed under said low rate of eighteen cents net to consumers; that inasmuch as the rate ordinance of date March 6, 1911, was for a future period of five years; that said defendant company could not and did not accept the same. Temporary restraining order was allowed and the defendant company was enjoined from charging any other or different rate than that named in the ordinance, to wit. eighteen cents net."

Again, on page 5 of said brief:

> "The Newark Natural Gas & Fuel Company when organized in 1889 was known as The Everett Company, and for several years was both a producing and distributing company, holding quite an area of supposed gas territory, with forty or more producing wells; but for the past ten or twelve years it has owned no territory and no producing wells, and has become a distributing company, pure and simple. It must, therefore, perforce, buy its gas in the market. It has no other alternative now or for the future.

"The Logan Natural Gas and Fuel Company was organized later in 1894, as an Ohio corporation, at Logan, Ohio. It was and is both a producing, transporting and distributing company. Both of these companies are Ohio corporations, each independent of the other, except by said contract referred to."

On page 6 of the brief:

"In 1904 the Newark Company entered into a contract with the Logan Natural Gas and Fuel Company to furnish what gas might be needed at the corporation line, for a period of ten years, under the terms and conditions therein provided, which was on a percentage basis of the aggregate readings of the consumers' meters, which contract expired on the first day of March, 1913, thus leaving the Newark Company with the only alternative, viz., to purchase at wholesale all its gas for distribution for the city of Newark, Ohio, in the open market."

If we concede for the purpose of the argument that the plaintiff in error in its original answer raised a Federal question, and that that question is raised, as stated in the brief of plaintiff in error filed in this court, yet it is conceded by the brief of plaintiff in error that that question practically is, was the twenty-cent rate fixed by the ordinance of the city council unreasonable and confiscatory, and that each Federal question claimed to be raised arises upon the question whether or not the rate was an unreasonable and confiscatory rate. The three courts that have passed upon this case have found upon the evidence adduced by plaintiff in error in the trials of this case, accepting their own valuation placed upon the plant of the Newark Natural Gas & Fuel Company, that the rate of twenty cents or eighteen cents net, fixed by the ordinance, yielded them a net revenue which was clearly compensatory and furnished them an adequate return not only for the money invested in the enterprise, but upon the highest valuation which it placed upon its entire plant, and also establishes the fact that if you take

the valuation fixed by another witness of the plaintiff in error, which was not the highest valuation, that the net profit of this company derived from the twenty-cent rate, eighteen cents net, was two or three times what the courts have held to be an adequate return to public-service corporations upon the capital or value of the property invested. We cannot see how this court can review these findings of fact, and if this court must proceed upon the basis of these facts being established in this case, the plaintiff in error is clearly not entitled to any relief, even if we concede that this court has jurisdiction, and that a Federal question is involved. Upon the theory that the plaintiff in error in the trial of this case was entitled to show the cost of the production and transportation of gas, the court permitted evidence to be introduced on that subject, and plaintiff in error was fully heard upon that claim, yet, notwithstanding this evidence, the court found that there was a contract between these two companies by which the Logan Company agreed to supply the Newark Company with gas for distribution under its franchise for a period of ten years, from 1903 to 1913, the Logan Company to receive seventy per cent and the Newark Company thirty per cent of the gross receipts, and gas was furnished by the Logan Company to the Newark Company under this contract at twenty cents per thousand feet, eighteen cents net, from 1903 to 1911, at which time the Newark Company attempted to raise the price to twenty-five cents, and the ordinance of that year fixing the rate at the theretofore prevailing rate was passed.

This contract prevailed between the two companies by its terms until 1913, and although this case was tried in 1914, in the Court of Appeals, no showing was made by the plaintiff in error that any different rate for the supply of gas to the Newark Company by the Logan Company prevailed, or that the Logan Company charged it any more after the expiration of this contract than it did before, nor was any showing made that the profits to the plaintiff in error com-

pany were any less after the expiration of this contract than it was before, it being conceded that the Logan Company continued to supply to the Newark Company the gas distributed by it on the same basis as theretofore.

We contend that the cost of the production of gas under these circumstances was not a material issue in this case and did not and could not affect the profit which the Newark Company derived under this franchise and under the twenty-cent rate, and we therefore claim that the plaintiff in error is not entitled to complain in this court that the court below under these circumstances failed to base its judgment wholly upon the evidence of the cost of production of gas to the Logan Company.

This record shows that all the courts below did consider the question of the cost of the production of gas, but each court found from the evidence that under the rate charged the Newark Company received a net profit during all the years that it operated under this franchise, which was clearly not unreasonable and clearly not confisactory under any view which the court could take of the value of the plant of the Newark Company in the light of the evidence.

The record in this case shows that the gas furnished to the city of Newark by the plaintiff in error company under its franchise was obtained, forty per cent of the same by purchase by the Logan Company from the Connecting Gas Company at Sugar Grove, Ohio, and at a price not disclosed by the plaintiff in error company by any testimony contained in the record, and that sixty per cent of the gas consumed by the city came into the distribution lines of the Newark Company from the near-by Knox-Licking field, a distance of ten to fifteen miles only, under its own pressure, through the pipe lines of the Logan Company, and without the intervention of any pumping or compressing stations or instrumentalities, and this record contains no attempt upon the part of the plaintiff in error or the Logan Company to show the cost of the production of the particular gas deliv-

ered to the city of Newark from the Knox-Licking field, the only evidence contained in the record of the cost of production by the Logan Company being as to the cost of the entire production in all its fields in Ohio, which the record shows was derived from wells in the 466,000 acres under lease located in the Sugar Grove, Knox-Licking, Ashland, and Lorain fields of the State, so that this court could not examine this record and tell what it cost the Logan Company to produce or supply to the Newark Company the gas which was furnished by the Newark Company to its consumers in the city. To support this contention we copy from the record of this case the following parts thereof:

From the testimony of Henry Coyle, witness for plaintiff in error, who testified that he was the general superintendent of the field and lines of the Logan Natural Gas and Fuel Company, and we copy from page 367 of the printed record of the Supreme Court, from the cross-examination of the witness:

> "Q. You don't use this pumping station to aid in the present supply of natural gas by your company to Newark, do you?
> "A. No, sir.
> "Q. The gas that comes in here from the Knox-Licking field comes in under its own pressure?
> "A. In Licking township and Granville and Union. Some of that gas comes in here under its own pressure."

We quote from the cross-examination of Henry Coyle, from pages 369 and 370 of the printed record of the case in the Supreme Court:

> "Q. Hasn't the Logan Company a line of its own to the Ohio River?
> "A. No, sir.
> "Q. Hasn't it one about completed, that it has constructed?
> "A. No, sir. It belongs to what is called the Connecting Gas Company."

Page 372:

"Q. How does the Logan Company get to Newark?
"A. They take gas from the West Virginia line, to Sugar Grove, and Bangs, and into the 10-inch line coming here."

We quote from the cross-examination of the testimony of John I. Henderson, an employee of the Logan Natural Gas & Fuel Company, from page 417 of the printed record of the case in the Supreme Court:

"Q. How much gas is delivered to Newark a year from the Homer field (same as so-called Knox-Licking field) to your company?
"A. I think about 60%.
"Q. How much gas? What is the volume, I mean?
"A. That would be about nine hundred million feet.
"Q. In how long a time?
"A. In a year.
"Q. Nine hundred million feet a year was delivered from the Homer field by your company to the city of Newark?
"A. Yes, sir."

Page 418:

"Q. Well, sixty per cent is the average that comes from the Homer field during the whole year?
"A. Yes, sir."

We quote from the direct examination of A. J. Drolet, general auditor of the Logan Company, from pages 442 and 443 of the printed record of the case in the Supreme Court:

"Q. Has the Logan Natural Gas corporation any gas leases in West Virginia?
"A. No, sir.
"Q. Well, does the Logan Company own any interest in any companies in West Virginia?
"A. No, sir. The Logan Company has no interest in any stock or leases in West Virginia.

"Q. Has it any interest or holdings in the Connecting Gas Company?

"A. No, sir.

"Q. What is that company?

"A. The Connecting Gas Company is merely a transportation company. It takes the gas from the Ohio river line—twelve-inch—and transports it to the Sugar Grove station for distribution to Ohio companies.

"Q. Where is the gas of the Connecting Gas Company sold to the Ohio companies?

"A. At Sugar Grove, Ohio."

Concerning the portion of the brief of plaintiff in error found on pages 19, 20, 21 of the brief, we have to say that this evidence was excluded by the trial court, as appears by the record.

We quote from pages 126, etc., of the printed record of this case in the Supreme Court, from the testimony of Harold Franklin, clerk of the city council of the city of Newark, Ohio, and the witness produced Journal 15, page 496, of the proceedings of the city council of the city of Newark, December 19, 1910, and counsel for plaintiff in error offered in evidence the communication of that date, appearing on pages 19, 20, 21 of plaintiff in error's brief, and on page 130 of the record the court sustained the objection and ruled out the evidence, to which counsel for plaintiff in error excepted.

If this should be regarded proper evidence for this court to consider we wish to point out the fact, as shown by this evidence, that Marietta, Ohio, was paying eighteen cents net; Utica, Ohio, which lies contiguous to and almost within the Knox-Licking field, was paying fifteen cents net; Mt. Vernon, which bears the same relationship to the Knox-Licking field as the city of Newark, was paying eighteen cents net.

Counsel for plaintiff in error made the statement on page 8 of their brief:

> "After three years' delay by the city, on March 6, 1911, the city council passed an ordinance fixing the rate at the same inadequate and unreasonable rate, to wit: 18 cents net."

In contradiction of this statement we quote from the direct examination of K. C. Krick, agent of the gas company, from pages 146-147 of the printed record of this case in the Supreme Court, Mr. Krick being the only witness who testified on this subject:

> "Q. Your name is K. C. Krick?
> "A. Yes, sir, it is.
> "Q. Were you in the city of Newark in the winter and spring of 1911, at the time of the passage of this gas ordinance, while that matter was being discussed?
> "A. Yes, sir.
> "Q. I will ask you whether or not you appeared before the city council of the city of Newark in reference to this gas ordinance?
> "A. Yes, sir.
> "Q. How many times did you appear before that body?
> "A. I would say, approximately, seven or eight times.
> "Q. During how long a period?
> "A. Beginning about the 1st of September, 1910, and the last time, I believe, was in February, 1911.
> "Q. I will ask you whether or not you addressed the city council in reference to the rate ordinance?
> "A. Yes, sir. On various occasions. On all occasions when I was present."

The action of the plaintiff in error in furnishing gas to the city of Newark, from 1908 to 1911, at eighteen cents net per thousand feet was voluntary on its part, since the rate fixed by the city council in 1898 expired in 1908, and in view of the fact that there was no legislative rate in force the company had a right to demand and receive any price it might charge for gas during that time. According to the foregoing testimony of Mr. Krick, the company never demanded or asked for a higher rate until about six months prior to the passage of the ordinance now in question. So that the statement of counsel for plaintiff in error on page 9 of their brief:

> "Because the experience of four or five years previous with the same identical rate was not aided or helped by being repeated in a new ordinance,"

is not supported by the facts of the case. If the rate had been unsatisfactory, complaint would have been made before, and that it was satisfactory to the company up to the year 1911 may be conclusively inferred from the fact that the company made no complaint nor made any effort to have the rate increased.

We quote from the opinion of the Court of Appeals from pages 78 and 79 of the printed brief of the defendant in error. Upon this question the court say, pages 77, 78, 79:

> "Among other things, it is urged by the defendant company that wells in the Knox-Licking field (designated herein as the local field) have become so depleted of late, thereby increasing the cost of production, that neither the Logan Company nor any other company can furnish gas to the defendant company or the city of Newark and its citizens at the rate fixed by said ordinance with anything like a reasonable net profit on the value of its plant. If this claim is borne out by the facts, then the equitable relief asked by the defendant company should be granted.
>
> "But what are the facts in this respect as disclosed by the evidence? Undoubtedly the wells in the local field have become more or less depleted, owing to the causes described, and the evidence shows that said wells at the beginning of this litigation yielded more than four times the quantity of gas consumed by the city of Newark and its citizens. True, it is shown that only 60 per cent of the gas delivered at the city of Newark was of the product of said wells, and the balance is from the West Virginia fields. If this condition prevails there must be some reason for it, but no reason appears to be given, nor does the record show the cost to said company of producing gas in the local field, although there was no little testimony introduced by the plaintiff bearing upon the cost of producing natural gas in territory adjacent to the local field, as evidenced by the contracts for its sale

and delivery to various cities in this State. Omitting figures, it is sufficient that such testimony appears to warrant the statement that the cost of producing gas and its sale at the prices therein named about the time of the passage of said ordinance do not indicate that the rate fixed therein is confiscatory in its effect.

"Considerable testimony was offered upon the trial showing the price of gas delivered to various cities in this State as tending to show the general market price thereof delivered at the city of Newark. In the absence of any testimony tending to show the cost of producing and transporting gas to the city of Newark for distribution, such testimony would be entitled to no little weight, but what is the effect of such testimony as against proof of the cost of producing gas in the immediate vicinity of the local field, supplemented by proof that gas was being furnished at that time by said company at the 18-cent net rate? Situated as the city of Newark is, substantially contiguous to the local field, does not this fact, when considered in connection with the admitted fact that the citizens of said city were supplied with gas by the same company for years prior to and up to the time of the passage of said ordinance at a rate not in excess of the rate fixed by said ordinance, minimize, if not nullify, the legal effect of any showing of the market value of gas at said city at said time? Assuredly different conditions may exist in other cities, where possibly the price of gas may be governed by the volume of the supply and other considerations may also enter into the price there charged for gas, but, as we view it, the real question made here is not what the prevailing price of gas at that time was elsewhere, but what was it reasonably worth when furnished to the citizens of Newark, in view of all the conditions here shown, and is the rate fixed by said ordinance such as to yield a fair return on the reasonable value of the company's property above all legitimate and proper charges?

"As we read the record, the earnings of the defendant company during the year 1911 were such as to pay over 10 per cent net profit, and that in 1910

> they yielded a much larger net profit. True, the record covering these two years, standing alone, and in the absence of other evidence, might not be a safe criterion upon which to base a judgment of the net earnings of the company before that time, but the evidence shows that the total net earnings of this plant were very profitable from the time it was first organized, yielding to the management from 1902 to December 31, 1911, an average annual net profit of over 8 per cent, during all of which said time said company charged the citizens of the city of Newark for gas the 18-cent net rate. We do not feel called upon to pursue this inquiry further, feeling that the foregoing facts furnish their own comment, and while it is impossible to say with any degree of certainty what the net earnings of the company may be during the future five years' period, under said ordinance, it is reasonably safe to say that in view of the net earnings of the company during the period from 1902 to and including at least a portion of 1911, they will be such as to avoid the charge of being confiscatory in their effect."

Each of the courts before whom this case was tried or heard pointed out to the plaintiff in error in this case that at any future time should the rate determined by such court become confiscatory or unreasonable or a fair profit not allowed said company, that the court would be open to a remedy at any time within the five-year period covered by the ordinance herein in question.

The Court of Common Pleas, or the trial court, in its opinion said, page 59 of defendant in error's motion filed herein:

> "From those limited facts we are forced to conclude that the Logan Gas Company's estimate as to its cost of producing a single foot of gas is erroneous. Our conclusion is that the Newark Natural Gas & Fuel Company has under this ordinance made a fair profit on its investment, and that the excess held by the Newark Trust Company rightfully belongs to the citizens of Newark. Whether this ordinance will

> permit the company to earn a profit in the future we cannot state, and the company ought to be permitted to apply to the court for relief in the event it does not."

The Court of Appeals in its opinion say, upon this point, page 85 of the defendant in error's motion and brief:

> "As in the case of Knoxville *vs.* Knoxville Water Company, *supra*, so in this case, if it shall hereafter be made to appear under the actual operation of said ordinance that the returns allowed by it operate as a confiscation of property, the courts are open to afford a remedy."

And the Supreme Court of Ohio, in its decision upon this point, states on page 95 of our motion and brief:

> "The evidence disclosed in the record does not show that the rates fixed by this ordinance will result in a violation of the rights of property of the plaintiff in error, or that it will have the effect to deprive it of reasonable compensation for its services, and therefore, fails to establish a present right of plaintiff in error to exemption from compliance with the terms of said ordinance. Said company will, therefore, be required to abide the test of actual experience under the rate fixed by this ordinance, and when certainty rather than prophecy may be obtained, it will have the right to present its case upon actual facts and conditions as they may then be shown to exist."

This was the recent holding by this court in the Des Moines case, 238 U. S., 150, cited on page 11 of the defendant in error's brief in chief upon this motion.

From a perusal of the opinions appearing in the "Appendix" to the motion and brief filed by the defendant in error, of each of the courts before which this case was tried, it is clear that no claim was there made by the plaintiff in error that the Newark Natural Gas and Fuel Company and the Logan Natural Gas and Fuel Company were identical

corporations, were under joint control, or were in any sense allied under the same management. Indeed the distinct claim up to this time made was that these corporations were in all respects separate, distinct, and independent of each other. The statements now appearing in the brief of plaintiff in error, filed in this court, in which it is claimed or argued that these two corporations are in fact one and the same corporation or are under joint management or control, are statements of counsel merely, and are not justified by any reference to or by any evidence contained in, the record of this case, and are directly opposite to the claim made by the same counsel for the plaintiff in error in their brief filed in the Supreme Court of Ohio in this case.

We again call the court's attention to our motion, filed in this court, that there is no color of ground for the averment of a Federal constitutional question, and to page 9 of the brief of plaintiff in error to that effect that:

> "As heretofore stated, there never was any serious contention, that for the simple feature of distribution, which alone was performed by the Newark Company, receiving therefor 30 per cent of the aggregate reading at the consumers' meter, was not fairly sufficient."

While this sentence is not complete, we interpret it to be a concession of plaintiff in error that this 30 per cent was sufficient to yield to the Newark Company a fair and reasonable compensation for its part of the service performed. The Newark Company is the only party to this suit, and the only issue tried and determined in this case was to determine the reasonableness of the rate charged so far as it affected the plaintiff in error company alone, and the admission above referred to by counsel of plaintiff in error embraces the merits of the matter determined below and brought here for review, and if according to this admission the plaintiff in error company is earning a fair profit for the service it renders, on the value of the property it devotes to the public

use, then there is no color of ground for the averment of a Federal constitutional question, and we contend that these same questions have been repeatedly decided by this court contrary to the contentions of the plaintiff in error.

It becomes manifest, therefore, that the issues attempted to be made by plaintiff in error are made for the sole purpose of obscuring the real issues presented and were intended for delay only, and that the motion herein to dismiss or affirm should be sustained.

RALPH NORPELL,
FRANK A. BOLTON,
EDWARD KIBLER,
Attorneys for Defendant in Error.

(30677)

FEB 5 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 232

THE NEWARK NATURAL GAS AND FUEL COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEWARK, OHIO, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM OR TRANSFER TO SUMMARY DOCKET.

EDWARD KIBLER,
RALPH NORPELL,
FRANK A. BOLTON,
Attorneys for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 615.

THE NEWARK NATURAL GAS AND FUEL COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEWARK, OHIO, DEFENDANT IN ERROR.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, The City of Newark, Ohio, by Frank A. Bolton, solicitor, and its attorneys of record herein, and move this honorable court:

First. To dismiss the writ of error herein, on the ground that this court has not jurisdiction thereof, and that there is no color of ground for the averment of a constitutional question presented.

Second. To affirm the judgment of the Supreme Court of Ohio, on the ground that it is manifest that the paper purporting to be a writ of error herein was taken for delay only, and that the questions upon which it is claimed the juris-

diction of this court depend are so frivolous as to need little or no argument, having been repeatedly decided by this court contrary to the contentions of the plaintiff in error, The Newark Natural Gas and Fuel Company.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or affirm, because the case is of such a character as not to justify extended argument.

EDWARD KIBLER,
RALPH NORPELL,
FRANK A. BOLTON,
Attorneys for Defendant in Error.

NOTICE OF MOTIONS.

The Newark Natural Gas and Fuel Company is hereby notified that the City of Newark, Ohio, by Frank A. Bolton, solicitor, will on the 21st day of February, A. D. 1916, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record, and sections of the statutes and constitution of the State of Ohio, as contained in an appendix thereto, all of which are now served upon you herewith.

EDWARD KIBLER,
RALPH NORPELL,
FRANK A. BOLTON,
Attorneys of Record for Defendant in Error.

Copy of the foregoing motions and notice, together with the points and authorities, argument and appendix, received this — day of ——, A. D. 1916.

—— ——,
Attorneys for Plaintiff in Error.

STATE OF OHIO,
Licking County, ss:

Ralph Norpell, being first duly sworn according to law, deposes and says that he, being duly authorized in the premises, did on the — day of ——, A. D. 1916, serve a copy of the foregoing motions and notice, together with points and authorities, argument and appendix hereto attached, on S. M. Douglas, one of the attorneys for the plaintiff in error, by handing the same to him personally at his office, Mansfield, Ohio.

—— ——.

Sworn to before me and subscribed in my presence by the said Ralph Norpell this — day of ——, A. D. 1916.

—— ——,
Notary Public.

STATEMENT OF FACTS.

The council of the city of Newark, Ohio, granted a franchise to the Newark Natural Gas and Fuel Company on the 21st day of February, 1898, for a period of twenty-five years, which franchise was accepted by the company in writing. The price which said company could charge for a period of ten years was fixed at twenty-five cents per thousand cubic feet. A number of years prior to the expiration of the ten-year period the company voluntarily fixed the price of natural gas at eighteen cents per thousand cubic feet net. This price prevailed until March 6, 1911, when the council of said city passed an ordinance, in pursuance of the authority vested in it by the statutes of the State of Ohio, fixing the price of gas to be charged by said company for a period of five years at eighteen cents per thousand cubic feet net. After the passage of said ordinance said company gave notice to its consumers that the rate after the meter reading in April, 1911, would be twenty-two and one-half cents net per thousand cubic feet. That it was the rule of said company to turn off the gas for the non-payment of bills rendered by it. That on April 25, 1911, the defendant in error herein enjoined the collection of this rate in the Court of Common Pleas of Licking County, Ohio, and restrained the collection of said amount so fixed by said gas company, which injunction was, after trial had, made permanent by said court. That said case was appealed to the circuit court, and, after trial had, judgment was again rendered in favor of the defendant in error in May, 1914. The case was thereupon taken to the Supreme Court of the State of Ohio on error and was affirmed by an undivided court in June, 1915. That said plaintiff in error refused to obey the ordinance passed March 6, 1911, regulating the price it may charge and made no test whatsoever of the operation of said rate. That although oppor-

tunity was afforded for the introduction of evidence concerning the effect of the operation of the rate fixed, at the trial of this case on its appeal to the circuit court in May, 1914, said plaintiff in error failed and refused to offer any evidence concerning the same. The Supreme Court found that said plaintiff in error earned ten per cent in 1911 on the highest valuation fixed by said company and seventeen per cent upon the valuation placed upon said property by another witness testifying on behalf of said company. That said plaintiff in error is a distributing company—that is, it does not produce the gas it sells, but purchases the same from another company.

POINTS AND AUTHORITIES.

A.

A real and not a fictitious Federal question is essential to the jurisdiction of the Supreme Court over the judgments of State courts.

The bare averment of a Federal question is not in all cases sufficient; there must be color of ground for such averment.

Hamblin *vs.* Western Land Co., 147 U. S., 531.

A motion to dismiss a writ of error brought to review a judgment granting a peremptory writ of mandamus commanding the officers of a city to levy a tax to pay a judgment against it, with which motion is united a motion to affirm the judgment, this court will affirm the judgment if the reasons for taking the writ of error are frivolous and it was taken for delay only, notwithstanding this court has jurisdiction. * * * If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This court in the exercise of its inherent power and duty to administer justice ought, independently of subdivision 4, rule 6, to reach the mischief by affirming the action below.

132 U. S., 210.

We have jurisdiction of this case. The motion to dismiss is therefore denied, but as the only Federal question presented on the merits was decided by the court below in accordance with our rulings

in Bank *vs.* Matthews, 98 U. S., 621, and Bank *vs.* Whitney, *ante*, 443, the motion to affirm is granted.

Swope *vs.* Leffingwell, 105 U. S., 3.

A motion to affirm may be united with a motion to dismiss a writ of error or appeal on the ground that, although the record may show that this court has jurisdiction, it is manifest that the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Hinckley *vs.* Morton, 103 U. S., 764.

Evans *vs.* Brown, 109 U. S., 180.

Walston *vs.* Nevin, 128 U. S., 578.

Metcalfe *vs.* Steamship Alaska, 130 U. S., 201.

This case is before us upon a motion to dismiss for want of jurisdiction. A similar motion was made and overruled at the last term, and we are satisfied with that decision. Rule 6 provides that there may be united with the motion to dismiss a writ of error to a State court, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest that the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument. "So far as we can discern from the record the only Federal question involved in this case was decided at the present term in Windsor *vs.* McVeigh. And if there had been united with the motion to dismiss a motion to affirm, we should, as at present advised, have been inclined to have entered a judgment of affirmance. The only motion, however, is one to dismiss, and that is the only motion that the plaintiff in error has had notice. He has never been called to meet a motion to affirm.

If a party desires to obtain an affirmance under the operation of this rule, his motion must be to affirm as well as dismiss—of this the plaintiff must have requisite notice, so that he may resist if he chooses. The further hearing of the motion as it now stands is therefore postponed with leave to the defendant in error to amend by adding a motion to affirm, because the question involved has already been decided and no further argument is necessary.

Foree *vs.* McVeigh, 93 U. S., 1010.

The bare claim that the judgment of the highest State court operated to take the property of the plaintiff in error without compensation is not to justify the Federal Supreme Court in taking jurisdiction of a writ of error to the State court, unless it also appears from the averments of facts upon which the claim must depend that the question is real and substantial, and not so utterly without merit as to be frivolous, and not concluded by previous decisions.

Consolidated Turnpike Co. *vs.* Norfolk & Ocean View Ry. Co., 228 U. S., 595.

Equitable Life Assurance Society *vs.* Brown, 187 U. S., 308.

New Orleans Waterworks Co. *vs.* Louisiana, 185 U. S., 336.

Deming *vs.* Carlisle Packing Co., 226 U. S., 102.

That although a Federal question was raised below in a formal manner, that question when examined with reference to the averments of fact upon which it was made to depend is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause

the Federal question relied upon to be devoid of any substantial foundation or merit.

Equitable Life Assurance Society *vs.* Brown, 187 U. S., 308.

B.

"The case must be a clear one before the courts should be asked to interfere by injunction with State regulations regulating gas rates in advance of any actual experience of the practical result of such rates." A court of equity ought not to interfere by injunction with State legislation fixing gas rates before a fair trial has been made of continuing the business under such rates where the rates complained of show a very narrow line of division between possible confiscation and proper regulation, as based upon the findings as to the value of the property, and the division depends upon variant opinions as to value and upon the results in the future of operating under such rates." "The dismissal of a bill which seeks to enjoin the enforcement of legislative regulation of gas rates as confiscatory in advance of any actual experience of the practical result of such rates should be without prejudice when such practical experience may prevent the complainant from obtaining a fair return upon the property used by it in its business."

Wilcox *vs.* Consolidated Gas Co., 212 U. S., 17.

"The courts should not enjoin the enforcement of municipal ordinance fixing maximum water rates on the ground that such ordinance is invalid under U. S. Const., 14th Amendment, as confiscatory, unless the confiscation is plainly apparent.

"The net income of a waterworks company during the years succeeding the passing of a municipal ordinance fixing maximum water rates, which has never been enforced should be considered by the courts in determining the reasonableness of such rates.

"We think it error to confine the investigation to and base the judgment upon that year alone. The precise subject of inquiry was what would be the effect of the ordinance in the future. The operations for the preceding fiscal year were valueless if the year was abnormal and were only of significance so far as they foretold the future. If, as in this case, sufficient time has passed so that certainty instead of prophecy can be obtained, the certainty would be preferable to the prophecy. In this case there could be no absolute certainty, because the ordinance had never been put in operation. But evidence of the operations of the years succeeding the passage of the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty could be obtained. Suppose, by way of illustration, that before bringing suit the company had put the ordinance into effect and had observed it for a number of years, and the result showed that a sufficient net income had been realized, is it possible that a suit then could be brought, and by a process of speculation be reached that the ordinance would be confiscatory? It follows from what has been said that the judgment of the court below cannot stand. * * * There was error in the appraisement of the present value of the plant, in the deduction of the reductions made by the ordinance, and in the exclusion of evidence of the operation of subsequent years. * * * Disregarding for the moment all the errors which were committed in the court below, the decision of this cause may be

rested upon a broader ground, which is clearly indicated by the previous judgments of this court. The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would be confiscatory in its effect as to violate the Constitution of the United States. * * * Where the case rests as it does here, not upon operation of the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation."

Knoxville *vs.* Knoxville Water Co., 212 U. S., 1.

"A court of equity ought not to interfere with and strike down an act of the legislature fixing maximum express rates before a fair trial has been made of continuing the business thereunder, and in advance of any actual experience of the practical result of such rates."

State *vs.* Adams Express Co., 122 N. W., 691.
State *vs.* Wells, Fargo & Co., 122 N. W., 697.

"The refusal of a court to enjoin the enforcement of gas rates fixed by municipal ordinance upon the conclusion reached that a return of six per cent per annum on the valuation of the gas company's property would not be confiscatory will not be disturbed on appeal, especially where the ordinance was attacked before an opportunity was afforded to test its results by actual experience."

Des Moines Gas Co. *vs.* City of Des Moines, 238 U. S., 150.

ARGUMENT.

It is the contention of the defendant in error that the taking of a writ of error to the Supreme Court of the State of Ohio by the plaintiff in error is for delay only, that the constitutional defenses urged by it have no color of ground for averment as this court has repeatedly decided adversely to the claim of the plaintiff in error all the propositions presented herein. In support of the contention that this writ was taken for delay only, we submit that the council of the city of Newark passed an ordinance fixing the rate complained of at twenty cents—eighteen cents net—per thousand cubic feet, which was the same rate that had obtained for a number of years prior to the passage of the ordinance, and that the rate previously charged by the plaintiff in error was one fixed by it voluntarily, although it might have charged twenty-five cents under the ordinance.

The plaintiff in error submitted in the trial of the case the record of its business from the time of its organization to and including the year 1911, during which year, April 26, this injunction was obtained by the defendant in error on account of the refusal of the plaintiff in error to abide by the rates fixed in the ordinance. After the temporary injunction allowed to defendant in error had been made permanent the plaintiff in error appealed the case to the Court of Appeals of Licking County, Ohio, where judgment was again rendered for defendant in error, and the Supreme Court found that although more than two years had elapsed since the ordinance was put into effect, plaintiff in error introduced no proof concerning the practical result of the operation under said rate, although it had the opportunity to do so in the Court of Appeals. The failure or refusal of the plaintiff in error to introduce such evidence on this subject during those years can give rise to but one presumption, and that is, that the amount earned during those years was as much, if not more, than the amounts

earned during the years which it furnished gas voluntarily under the same rate. This court has repeatedly held that cities and States have the right of regulation and the only limitation placed upon that right is that the rate fixed must not be confiscatory. Where rate-making bodies fix rates, the same as has been voluntarily charged, in the absence of proof to the contrary, there ought to be a strong presumption that the rates fixed were reasonable.

The plaintiff in error had no right to refuse to abide by the terms or rates fixed in the ordinance. Its remedy, if any, should be by appeal to the courts for injunction if the facts concerning its business justified such appeal. It was its duty under the repeated holdings of this court to make a trial of the practical result of operation under the ordinance, and, failing to do so, and in refusing to obey the ordinance, and demanding and fixing a rate in advance of that fixed by the ordinance, and requiring this defendant in error to compel its enforcement, this court ought to refuse to take jurisdiction of this case and dismiss or affirm the same. This plaintiff in error places itself in the rather peculiar position of refusing to obey the law and yet asks its protection. In order to give this court jurisdiction of this case the plaintiff in error should show to this court that it made a practical test of the rate fixed; that such rate was, in fact, confiscatory, and that it had invoked the action of the court to enjoin the rate on that ground. It had no right to refuse to comply with the ordinance and compel the city to seek the aid of the court to enforce compliance. If all laws passed depended upon the action of courts for their enforcement, chaos would result. The duty of this plaintiff in error was to make a trial of the rates fixed and, if after such trial it was discovered that it was not earning a fair return upon the property invested in the public service, the courts were open to it for a remedy. The refusal or neglect of the plaintiff in error to place in evidence its business during the years 1912, 1913, and 1914, to September

26, as it had an opportunity to so do in the trial of the case in the circuit court, as found by the Supreme Court of the State of Ohio, cannot operate otherwise than as a presumption that its business was as profitable as in the preceding years, and the conclusion is inevitable that these proceedings are intended for delay. The Common Pleas Court held that, from 1902 to 1911, the net earnings of the plaintiff in error were over nine and one-half per cent per annum. The circuit court held that from 1902 to 1911 the net earnings of the company were over eight per cent per annum. The Supreme Court of Ohio found that this company, in 1911, earned ten per cent upon the highest valuation put upon the plant of the plaintiff in error by any witness. That upon the valuation placed upon the plant by another witness, for the plaintiff in error, plaintiff in error earned an approximate profit of seventeen per cent in 1911. A summary of the testimony of Mr. Wyer, one of the witnesses referred to by the Supreme Court, together with the testimony of Mr. Lord, the other witness referred to, appears in the appendix hereto. We also attach hereto a chart introduced by plaintiff in error in the trials of this case in the courts below, showing the earnings and investment of plaintiff in error from 1902 to 1911, both years inclusive. The net earnings of the plaintiff in error in 1911, on the rate here complained of, amounted to $43,210.60. The highest valuation placed upon the property of plaintiff in error was $432,208. (See summary statement of Wyer in appendix.) So that in that year, the year in which these proceedings were started, the plaintiff in error earned ten per cent upon its investment. In 1910 the earnings were slightly in excess of those in 1911; in 1909 the earnings were somewhat lower than those of 1911, and in 1908 the earnings were again about the same, and the betterments added during those years make no material difference in the calculation. Mr. Lord, whose testimony is hereto attached, placed a valuation on the physical elements of the plant at $309,000,

on a reproduction basis. Mr. Wyer's estimate of the valuation of the physical elements of the plant, on the same basis, was $356,708. Showing at a glance a marked discrepancy between the witnesses. Conceding, for the purpose of this motion, that the value of the plant of the plaintiff in error is $432,208, this court is asked to say that a net return of ten per cent upon the valuation of the property of the plaintiff in error used in the public service amounts to and is a confiscation of the property of this company, and that the ordinance fixing this rate is unconstitutional and void. It must be borne in mind that the plaintiff in error is a distributing company and purchases all the gas that it sells. (See contract between Logan Company and Newark Company hereto attached.) None of the elements of risk ordinarily attendant upon the operation of public utilities generally are present here. The cost of production so far as this company is concerned is absolutely fixed. This company under its agreement and even after the expiration thereof, so far as the evidence discloses, received gas under the same conditions and terms—namely, on a percentage basis of the gross receipts, plaintiff in error receiving thirty per cent and the Logan Company seventy per cent. If conditions should change during the life of the rate ordinance whereby plaintiff in error had to pay a larger percentage of the gross receipts or purchase gas at a higher rate, so that plaintiff in error could not operate with a fair profit, then, and not until then, would it be entitled to the consideration of any court. So far as the record discloses there has been no change in the basis of operation between these two companies, and this court will not indulge in speculation or prophecy concerning matters or facts in the possession of the plaintiff in error and not disclosed. The cost of production so far as this plaintiff in error is concerned is not a variable but is a fixed factor, and so long as that condition prevails there is less risk in the operation of their plant than is ordinarily attendant upon public-service operations, as

cost of production in other public-service enterprises is a constantly variable proposition. If any future arrangement of the plaintiff in error for its supply of gas necessitates the payment of more money than that paid under the present arrangement, so that a fair profit could not be had, it would be entitled to the protection of the courts, but the courts will not indulge in speculation where certainty can be had. Without going into any of the matters or elements considered by the engineer in arriving at his valuation of $432,208, we contend that this plaintiff in error, having earned ten per cent upon this valuation in the year 1911, the year in which these proceedings were commenced, and in preceding years, that there was no color of ground on the part of the plaintiff in error for the averment of a Federal Constitutional question.

Respectfully submitted,

RALPH NORPELL,
EDWARD KIBLER,
FRANK A. BOLTON,
Attorneys for Defendant in Error.

APPENDIX.

Pursuant to the rules and practice of this honorable court and for the purpose of these motions only, defendant in error has caused to be printed the pleadings and petition for a writ of error filed herein; also the decision and judgment of the Court of Common Pleas, the Court of Appeals, and Supreme Court of the State of Ohio; also the contract between The Logan Natural Gas and Fuel Company and The Newark Natural Gas and Fuel Company; also the summary statement of the valuation of the plant of plaintiff in error by Mr. Wyer; also the testimony as to the value of the plant by Mr. Lord; also chart of the investment and earnings of plaintiff in error from 1902 to 1911, both years, inclusive; also a copy of section 3982 of the General Code of the State of Ohio.

PLEADINGS.

Court of Common Pleas.

Petition.

(Filed April 25, 1911.)

Plaintiff says that he is the duly elected, qualified and acting solicitor of the city of Newark, Ohio, a municipal corporation of the State of Ohio, of the grade of city, and that he brings this action under and by virtue of authority conferred upon him by section 4312 of the General Code of the State of Ohio, and under direction of the city council of said city of Newark by resolution duly passed by said council.

That the defendant, The Newark Natural Gas & Fuel Company, is a corporation organized under the laws of the

State of Ohio and doing business in the city of Newark by furnishing natural gas for fuel and light to the city of Newark aforesaid and to the inhabitants thereof, by virtue of a franchise granted by the council of said city by ordinance passed February 21, 1898.

By said ordinance there was granted to defendant company the right and privilege of laying pipes in and through the streets and alleys and public grounds of said city for the purpose of supplying and conveying natural gas or fuel gas to the inhabitants of said city for a period of twenty-five years. It was provided in said ordinance that for the period of ten years from the passage of said ordinance the defendant company should have the right to charge consumers of gas who were inhabitants of said city for gas furnished at the rate of twenty-five cents for one thousand cubic feet.

By the terms and provisions of said ordinance the acceptance of the same in writing was required to be filed with the council of said city of Newark within ninety days after the passage and taking effect of said ordinance. Said ordinance was duly published according to law and is now in full force.

That within ninety days from the passing and taking effect of said ordinance, to wit, March 21, 1898, the defendant company accepted the same in writing, according to the provisions of said ordinance, and thereby agreed to supply gas as fuel and light to the said city and all of its inhabitants who might desire to use natural gas as fuel and light, or either, for the term of twenty-five years from that date.

That a copy of said ordinance, and the acceptance thereof by the defendant, is hereto attached, made part hereof and marked "Exhibit A."

That from the date of the passage of said ordinance franchise up to and until the 6th day of March, A. D. 1911, the council of the city of Newark passed no further ordinance regulating the price to be charged by defendant to itself and its inhabitants for gas for fuel and light, or either.

That ever since the passage and acceptance of said ordi-

nance the defendant has been continually, and now is, supplying gas to the said city and its inhabitants by virtue of the rights and privileges granted by said ordinance.

That on the said 6th day of March, A. D. 1911, the council of said city duly and legally passed an ordinance regulating and fixing the maximum price the defendant may charge consumers thereof, whether the city itself or its inhabitants, under said franchise and contract for the period of five years, at the rate of twenty cents per thousand cubic feet of natural gas for fuel and light, meter measurement, with a discount of ten per cent on all bills paid on or before the 10th day of each month.

That said last-named ordinance was on the 9th day of March, 1911, duly signed and approved by the mayor of said city and has now been duly and legally published as required by law, and a copy of said last-mentioned ordinance is hereto attached, made part hereof and marked "Exhibit B."

That said last-mentioned ordinance is now in full force, and that the price, as therein fixed by the council of the city of Newark, Ohio, is the same price said defendant has been, and is now, charging said city and the inhabitants who have been and are now consumers of gas in the city of Newark, Ohio, ever since the defendant began to furnish gas under said ordinance granting said franchise.

That the defendant had due knowledge and notice of the ordinance passed the 6th day of March, A. D. 1911.

That the defendant, now operating under the aforesaid ordinance, is notifying and has notified the inhabitants of said city, and said city, that on and after the April, 1911, reading of meters, the price charged for gas will be twenty-five cents for one thousand cubic feet, subject to a discount of ten per cent if paid on or before the tenth day of the following month, and it threatens that unless said price is paid by said city and its said inhabitants, on or before May 10, 1911, the time gas bills for April are payable, the defendant will stop the supply of gas and refuse to furnish gas for

fuel and light to the said city or any of the inhabitants who refuse to pay said price so fixed by defendant.

That the defendant intends and insists upon its right, to make the price for all gas furnished to the said city or its inhabitants on and after April 1, 1911, the said sum of twenty-five cents per thousand cubic feet, subject to said discount of ten per cent, and no less, and unless restrained by the court all consumers of gas furnished by the defendant will be required to pay twenty-five cents per thousand cubic feet, subject to said discount, on and after May 1, 1911, contrary to the provisions of the ordinance of the 6th day of March, 1911.

Plaintiff says that if the city for itself and each inhabitant for themselves be compelled to proceed against the defendant for refusing to furnish gas for fuel and light at the maximum rate provided in the ordinance of the 6th day of March, 1911, a multiplicity of suits would result, and that, among other reasons, he brings this suit on behalf of the city and all of the inhabitants in order to prevent a multiplicity of suits.

Plaintiff further says that the city and its inhabitants are each and all without remedy at law and can get no adequate relief, and will sustain great and irreparable damage unless granted relief from the processes of a court of equity, and they have no adequate remedy at law.

Wherefore plaintiff prays this honorable court that on the final hearing of this case the defendant may be perpetually enjoined from charging, collecting or in any way attempting to collect from the city or any of its inhabitants any other, greater, or further sum and amount for gas by it delivered for heat and light than the maximum sum or amount or rate fixed by said ordinance of the 6th day of March, 1911, and that said defendant be enjoined to specifically perform said ordinance and franchise contract, and that pending the final hearing of said case a temporary injunction issue to a like effect, restraining the defendant in like manner and for all other and further relief to which

this plaintiff, the city, or any of its inhabitants, may be entitled in equity and good conscience.

FRANK A. BOLTON,
Solicitor,
JONES & JONES,
FLORY & FLORY,
Attorneys for the Plaintiff.

(Duly verified.)

Ordinance No. 1318.

The Newark Natural Gas & Fuel Co.

Granting to the Newark Natural Gas & Fuel Company the right and privilege of laying pipes in and through the streets, alleys, avenues, commons, bridges, and public grounds and places of the city of Newark, Ohio, for the purpose of conveying and supplying natural gas or fuel gas to the consumers thereof, fixing and regulating the price to be charged therefor for a period of ten years, and repealing an ordinance passed by the City Council of Newark, Ohio, on April 23, 1888, granting to E. H. Everett and his associates the privilege of using the streets, lanes, etc., of said city for the purpose of laying pipes and conveying through them in said city gas or oil and regulating the price thereof.

SECTION 1. *Be it ordained by the City Council of Newark, Ohio,* That the Newark Natural Gas & Fuel Company, a corporation organized under the laws of Ohio, its successors and assigns, are hereby granted the privilege and invested with the right of using the said streets, lanes, avenues, alleys, bridges, commons and public grounds and places of said city for the term of twenty-five years, for the purpose of laying pipes to be used for conveying natural gas or fuel gas in

and through the said streets, lanes, avenues, alleys, bridges, commons and public grounds and places, for the purpose of laying such pipes and other appliances required to convey said gas to the consumer thereof.

Provided, That all of said pipes and appliances shall be laid in a good workmanlike manner, and said pipes to be of cast or wrought iron.

Provided, further, That all injuries done to said streets, lanes, avenues, alleys, bridges, commons and public grounds and places shall be repaired with due diligence by said The Newark Gas & Fuel Company, its successors and assigns, and said streets, lanes, avenues, alleys, bridges, commons and public grounds and places left in as good condition as before.

Provided, further, That said pipes shall not interfere with the drainage of said city by the necessary construction of sewers and other underground fixtures, for the conveyance of water within said city; nor shall the inhabitants thereof be liable in any damage for the necessary disturbance of said pipes on account of any improvement in the drainage of said streets, alleys, or public lands of said city, or in the construction of any public or private work.

Provided, further, That The Newark Natural Gas & Fuel Company shall preserve and keep said city safe, free and harmless from all damages that may be incurred or happen to persons or property by reason or on account of the rights granted herein.

Provided, further, That whenever a property owner along the line of said gas mains desires the use of natural gas or fuel gas, the said The Newark Natural Gas & Fuel Company, its successors or assigns, shall be required to lay, at its or their own expense, service pipes from their main line to the line of the lot occupied by the consumer.

Provided, further, That the said The Newark Natural Gas & Fuel Company, its successors or assigns, shall within ninety days from the passage and taking effect of this ordinance, accept this grant in writing to the City Council.

The privileges granted by the provisions of this ordinance shall not be forfeited by temporary suspension or operations unless such suspension be for a period of six months or more, when the city may declare all privileges and rights herein forfeited.

SECTION 2. *And be it further ordained,* That for a period of ten years from the passage and taking effect of this ordinance, the said The Newark Natural Gas & Fuel Company, its successors and assigns, shall be entitled to charge for any such gas furnished at the rate of twenty-five (25) cents per one thousand (1,000) cubic feet and for the use of each *of each* meter furnished by said company at the rate of twenty-five (25) cents per month and consumers shall be furnished gas by meter measurement if they so desire and the meters shall be of standard make, and when the consumer has paid in rent an amount equal to the cost of the meter, the same shall belong to the consumer and rent of meter shall cease.

Provided, That said The Newark Natural Gas & Fuel Company, its successors and assigns, shall, while furnishing gas during said period, furnish without charge natural gas or fuel gas for heating the City Hall, city offices, city prison, fire department, and other city buildings used for city offices only, and parts of buildings occupied by city officers,

Provided, further, Said The Newark Natural Gas & Fuel Company, its successors and assigns, shall, within ninety days from and after the passage and taking effect of this ordinance, accept the provisions hereof by written acceptance filed in the office of the clerk of this corporation.

SECTION 3. Be it further ordained that an ordinance passed by this Council on April 23, 1888, granting to E. H. Everett and his associates the privilege of using the streets, lanes, alleys, and public grounds of said city for the purpose of laying pipes and conveying through them in said city natural gas or oil, and regulating the price thereof, be and the same is hereby repealed.

SECTION 4. This ordinance shall take effect from and after its passage and publication according to law.

Passed Feb. 21, 1898.

O. B. v. 1, page 253.

DAN L. JONES,
Pres. of Council.

C. S. BRADY,
City Clerk.

B.

COUNCIL CHAMBER, NEWARK, OHIO,
MONDAY EVENING, Mar. 21, 1898.

Regular meeting, President Jones presiding.

Present: Bourner, Downey, Fristoe, Irwin, Jones, Kuhn, McCrum, Redman, Ritzer, Slanker—10.

Minutes of previous meeting read and approved.

Acceptance of Natural Gas Franchise.

To the City Council of Newark, Ohio, and to the City of Newark, Ohio:

The Newark Natural Gas & Fuel Company, a corporation organized under the laws of the State of Ohio, for itself and its successors and assigns, accepts the provisions of an ordinance of City Council of the City of Newark, Ohio, entitled "An ordinance granting to The Newark Natural Gas & Fuel Company the right and privilege of laying pipes in and through the streets, alleys, avenues, bridges and public grounds and places of the City of Newark, Ohio, for the purpose of conveying and supplying natural gas or fuel gas to the consumers thereof, fixing and regulating the price to be charged therefor for a period of ten years and repealing an ordinance passed by the City Council of Newark, Ohio, on April 23, 1888, granting to E. H. Everett and his associates the privilege of using the streets, lanes, etc., of said

city for the purpose of laying pipes and conveying through them in said city natural gas or oil, and regulating the price thereof, passed February 21, 1898."

THE NEWARK NATURAL GAS & FUEL CO.,
By E. H. EVERETT, *President,*
By A. P. TAYLOR, *Secretary.*

NEWARK, OHIO, March 18, 1898.

Adjourned.

DAN L. JONES,
President of Council.

Attest:
C. S. BRADY,
City Clerk.

Vol. 13, p. 524, Council Proceedings.

C.

Ordinance No. 2123.

Regulating and Fixing the Price The Newark Natural Gas & Fuel Company, Its Successors or Assigns, May Charge for Natural Gas for Light and Fuel in the City of Newark, Ohio.

Be it ordained by the council of the city of Newark, State of Ohio:

SEC. 1. For a period of five years next ensuing the city of Newark, Ohio, hereby establishes, fixes, and regulates the price The Newark Natural Gas and Fuel Company, its successors or assigns, may charge for natural gas for light and fuel to all persons, firms, or corporations using or consuming the same at twenty cents per thousand for each thou-

sand cubic feet of gas used or consumed. *Provided, however,* Such price is subject to a discount of ten per cent for all persons, firms, or corporations paying for the same on or before the tenth day of each month for such natural gas consumed the month previous thereto. The price herein fixed is the maximum said company may charge.

SEC. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed March 6th, 1911.

ELMER ORR,
Pres. Council.

Attest:
JAMES McCARTHY, *Clerk.*

Approved by the Mayor this 9th day of March, 1911.
JOHN M. ANKELE, *Mayor.*

I, James McCarthy, clerk of council, do hereby certify that the above ordinance was published in the *Newark Advocate* and the *American Tribune,* two newspapers of general circulation and opposite politics, published in the city of Newark, Ohio, on the 13th and 20th days of March, 1911.

(Signed) JAMES McCARTHY,
Clerk of Council.

Court of Common Pleas.

Amended Answer.

(Filed July 27, 1911.)

Now comes the defendant The Newark Natural Gas & Fuel Company and for amended answer to plaintiff's petition says: that it admits the averments and allegations stated in the plaintiff's petition from the first to the fourteenth paragraph thereof, both inclusive, which includes all statements

from the beginning of said petition to the following phrase: "contrary to the provisions of the ordinance of the 6th day of March, 1911," except that it denies that it threatens or has threatened that the defendant will stop the supply of gas and refuse to furnish to said city or any of its inhabitants who refuse to pay the price fixed by the defendant, and except also that while admitting that said ordinance of March 6, 1911, was passed in due form by the city council of the city of Newark, Ohio, fixing the price that defendant may charge consumers, yet defendant avers that said ordinance is unreasonable, and that the rate fixed denies to this defendant any adequate profit for the five years next ensuing and operates as a fraud upon the property rights of the defendant, and is therefore unreasonable and void. And said defendant further answering denies each and every averment in plaintiff's petition contained, and not herein expressly admitted to be true.

Second Defense.

And for second defense and further answering the defendant says, that the said ordinance of March 6, 1911, is contrary to and in violation of section one article one of the bill of rights of the constitution of the State of Ohio and is therefore null and void for the reason that said alleged ordinance is violative and a denial of the due possession and protection of the property of this defendant without its consent.

Third Defense.

And for a third defense the said defendant says that said alleged ordinance of March 6, 1911, is contrary to and in violation of section 19 of article 1 of the bill of rights of the constitution of the State of Ohio and is therefore null and void and of no effect for the reason that it is the taking of private property without due process of law in that said ordinance attempts to compel the defendant company to fur-

nish gas at a price without just compensation or profit and without any equivalent or just compensation in money and against and without the consent of the defendant herein.

Fourth Defense.

And for a fourth defense the said defendant says: That said alleged ordinance of March 6, 1911, is contrary to and in violation of section 1, article 14, of the amendments to the Constitution of the United States and is therefore null and void and of no effect for that it is the denial to this defendant of the equal protection of the laws and without due process of law in this: That it attempts and is designed to compel said defendant company to furnish gas for a period and at a price without adequate return, compensation or profit, and without the consent of the defendant herein.

Said defendant therefore prays, that the temporary restraining order herein granted may be dissolved, and the prayer of the petition be denied, and the said ordinance of March 6, 1911, be declared unreasonable, null, and void, and for all other proper relief in the premises.

S. M. DOUGLAS AND
FITZGIBBON & MONTGOMERY,
Attorneys for The Newark Natural Gas and Fuel Company.

(Duly verified.)

Court of Common Pleas.

Reply.

(Filed Oct. 14, 1911.)

Now comes the plaintiff and for reply to the first defense of the amended answer of the defendant denies that

said ordinance is unreasonable. Plaintiff further denies that the rate fixed denies to the defendant any adequate profit for the five years next ensuing and operates as a fraud upon the property rights of the defendant and is therefore unreasonable and void.

For reply to the second defense of the amended answer of said defendant, the plaintiff denies each and all of the allegations therein contained.

For reply to the third defense of the amended answer of said defendant the plaintiff denies each and all of the allegations therein contained.

For reply to the fourth defense of the amended answer of the defendant the plaintiff denies each and all of the allegations therein contained.

Wherefore said plaintiff prays judgment.

FRANK A. BOLTON, *Solicitor.*

(Duly verified.)

Certificate of Copies.

STATE OF OHIO,
Licking County, ss:

I, B. O. Horton, clerk of the courts within and for said county and State, in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, do hereby certify that the foregoing petition of plaintiff, amended answer, and reply are true and correct copies of the original pleadings now on file in said clerk's office in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Newark, Ohio, this 12th day of January, A. D. 1916.

[SEAL.] B. O. HORTON, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/12/16. B. O. H.]

The Supreme Court of Ohio.

No. 14,787.

THE NEWARK NATURAL GAS AND FUEL COMPANY,
Plaintiff in Error,
vs.
THE CITY OF NEWARK, by FRANK A. BOLTON, *Solicitor,*
Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

To the Honorable Hugh L. Nichols, Chief Justice of the Supreme Court of the State of Ohio:

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above-entitled case the plaintiff in error hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

The plaintiff in error alleges that in this cause, on the 2d day of July, A. D. 1915, final judgment was rendered against your petitioner by the Supreme Court of the State of Ohio, that being the highest court of law or equity in said State, wherein it was adjudged that the Common Pleas Court of Licking County, Ohio, did not err at the trial of this cause in holding that the provisions of a certain ordinance passed by the city of Newark on the 6th day of March, 1911, by its duly constituted legislative body, fixing a rate for natural gas to be charged by said plaintiff in error, was not in conflict with the Constitution of the United States or with the provisions of the first section of the Fourteenth Amendment of said Constitution, or with the provisions of the Fifth Amendment of said Constitution, and wherein it was also held by the Supreme Court of the State of Ohio that the Court of Appeals of Licking County, Ohio, did not err in

affirming said judgment of said Court of Common Pleas, and wherein it was by said Supreme Court of the State of Ohio further adjudged that said act of said City Council is a valid law and is reasonable, and not in violation of, or repugnant to, the Constitution of the United States, or either of the amendments hereinbfore cited.

In each and all of which rulings and judgments said Supreme Court of the State of Ohio erred, to the prejudice of the plaintiff in error, all of which appears in the record and final judgment of said Supreme Court of the State of Ohio affirming the judgment of the Court of Appeals of Licking County, Ohio, and the Court of Common Pleas of Licking County, Ohio.

Wherefore your petitioner prays for an allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment reversed and said cause remanded to said Court of Appeals for further consideration.

THE NEWARK NATURAL GAS & FUEL COMPANY,
By EUGENE MACKEY,
S. M. DOUGLASS,
JAMES R. FITZGIBBON,
CHARLES MONTGOMERY,
Its Attorneys.

STATE OF OHIO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Newark Natural Gas and Fuel Company to the city of Newark, Ohio, in the sum of three thousand dollars; such bond when approved to act as a supersedeas.

Dated August 7, 1915.

HUGH L. NICHOLS,
Chief Justice Supreme Court of Ohio.

(Endorsed:) No. 14,787. The Supreme Court of Ohio. The Newark Natural Gas and Fuel Company, plaintiff in error, *vs.* The City of Newark, by Frank A. Bolton, solicitor, defendant in error. Petition for writ of error from the Supreme Court of the U. S. to the Supreme Court of the State of Ohio. Filed Aug. 20, 1915. Supreme Court of Ohio. Frank E. McKean, clerk. Eugene Mackey, S. M. Douglass, James R. Fitzgibbon, and Charles Montgomery, att'ys for plaintiff in error.

Section 3982 of the General Code of the State of Ohio.

SEC. 3982. The council of a municipality in which electric lighting companies, natural or artificial gas companies, or companies for supplying water for public or private consumption, are established or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them.

Summary Statement of Value of Plant by Samuel S. Wyer.

I. Plant Reproduction Cost Summary.

1. Real estate	$425
2. Low pressure gas mains	123,898
3. Medium pressure gas mains	36,680
4. High pressure gas mains	54,750
5. Gate valves	1,013
6. Regulators and regulator fittings	8,795
7. Services	45,111
8. Meters	47,887
9. Shop and tools	600
10. Vehicles	1,961
11. Office equipment	2,209
12. Pavement over mains	33,379
Total	$356,708
13. Promotion, legal, organization, superintendency, contingent, interest during construction, taxes during construction, 20 per cent of sum of items 1 to 12	71,342
Total reproduction cost of plant	$428,050

II. Property Value Summary.

a. Present value of plant, allowing for appreciation, also for shrinkage due to depreciation, is estimated at 80 per cent of reproduction cost new—80 per cent of $428,050	$342,440
b. Cost of developing business in acquiring 6,484 service connections, or the present going value of the property in excess of the "bare bones of the plant" and representing the difference between a "dead plant and a live one," is estimated at 17 per cent of the reproduction cost of the plant—17 per cent of $428,050	72,768
c. Total amount of material, stock, and supplies on hand April 1, 1914	2,000
Total present value of property as of April 1, 1914	$417,208
d. Working capital there is allowed	15,000
Total value for rate-making	$432,208

Testimony of R. S. Lord on Valuation of Plant.

R. S. LORD, being first duly sworn, as provided by law, testified as follows:

Direct examination.

Examined by Mr. Chas. W. Montgomery:

Q. Your name is R. S. Lord?

A. Yes, sir; it is.

Q. Where do you reside, Mr. Lord?

A. I reside at Pittsburgh.

Q. What is your business?

A. I am secretary and treasurer of the Hope Engineering and Supply Company. Do you want to know the business of the company?

Q. Yes, sir. What is the business of the company?

A. We do a general gas engineering and construction work and handle anything in the line of natural gas. We do not do much in artificial gas.

Q. Can you state in a more detailed way your business in that connection?

A. I had four years' experience with the Philadelphia company in piping certain towns, Homestead and Duquesne, and in 1903 I went into the independent business, and since that time I have been connected with a company that has been furnishing piping material and constructing lines,—city distributing systems extensively. We make a specialty, and we are about the only ones who make it a specialty in laying out a piping system, furnishing everything and building the line, and turning it over to the company ready to receive the gas, which they must provide.

Q. Do you know what the cost of installing such a system as that is?

A. Yes, sir.

By Mr. Jones: What kind of a system is it?

By Mr. Montgomery: Such as he described.

By Mr. Jones:

Q. A pipe line or a distributing system?

A. Both.

Q. Did you make a valuation of the distributing system of the Newark Natural Gas and Fuel Company in the city of Newark?

A. I did, and one item beyond the city, the line from Thurston to Newark.

Q. When did you make that examination?

A. About the middle of last March.

Q. For whom was that done?

A. I was employed by the president of the Newark Natural Gas and Fuel Company.

Q. When was that?

A. Between the 19th and some time after the 20th I was in Newark on that work.

Q. What items did you consider in estimating the value?

A. The cost of the material, as near as I could determine the time it was put in, and the labor of installing that material at that time.

Q. Do you know when that was?

A. It was scattered over a number of years. I have in my report items of several years—1904 and so on. I could not give the exact dates without looking them up. But it would average about ten years ago.

Q. From your examination and investigation could you tell how the valuation in March, 1912, would compare with the valuation at the time the plant was installed?

A. The material cost in 1912 was lower than when this plant was put in slightly; the labor cost was a good deal higher, and on the basis of doing the work in 1912 it would have cost a little more than it did originally. With a view to the different conditions of the town in reference to paving, that would have added very materially to the cost; it would run up several thousand dollars on account of the paving, which was not there when the plant was installed.

By Frank A. Bolton: We object. That cannot be taken into consideration.

The Court: The objection is overruled.

By Mr. Bolton: Note an exception.

By Mr. Montgomery: Read the question.

(The stenographer read the question.)

A. If you are to consider what the plant was worth in 1912, the original material, of course, had depreciated to some extent and repairs were made, which added to some extent to the original cost. It would depend upon the whether it was replaced with other material. It might be anywhere between junk and in first-class condition. I don't think I can answer the question definitely.

Q. I will ask you to state how the valuation in March, 1912, of this plant, as a going concern and distributing system, compared with the valuation at the time it was constructed.

By Mr. Bolton: I object.

The Court: The objection is sustained.

Q. I will ask you how the physical value of this plant, in actual operation, in March, 1912, compared with the physical value of the plant at the time it was installed.

By Edward Kibler: That is objectionable.

The Court: We think the question is proper.

By Edward Kibler: Note an exception.

By Mr. Montgomery: Read the question.

(The stenographer read the question.)

By Edward Kibler: We object.

The Court: He may answer.

A. I would suppose that its operating value today——

By Edward Kibler: We do not want anybody's supposition.

The Court: The objection is sustained.

The Witness: I think it is equal to what it was in the beginning. Is capable of doing the same work.

By Edward Kibler: I move to rule out the answer.

The Court: The motion is overruled.

By Edward Kibler: Note an exception.

Q. I will ask you to state what was the physical value of this plant of the Newark Natural Gas and Fuel Company when you made this examination in March, 1912?

A. Three hundred and nine thousand and some odd thousand.

Q. I will ask you whether in those figures you included anything except the physical value?

A. Nothing whatever.

Q. I will ask you to state what other items in addition to the physical value of the plant should be considered in determining the actual value of the plant.

By Edward Kibler: I object. I do not think that is competent.

The Court: I think that is objectionable. I will sustain the objection.

By Mr. Montgomery: Note an exception.

The Court: We will take a few minutes intermission now.

(Here the court took a recess.)

R. S. Lord, direct examination (resumed).

Examined by Chas. W. Montgomery:

Q. I will ask you whether or not there are any items of actual investment other than what is represented by the physical property of a plant?

By Edward Kibler: I object.

A. Yes, sir.

The Court: The objection is overruled.

By Edward Kibler: Note an exception.

Q. What are they?

By Edward Kibler: I object.

The Court: The objection is overruled.

By Edward Kibler: Note an exception.

A. Expenses of operation during the time that the plant is being constructed. When I say "operation" I mean such as the salaries and other charges which must pertain to any plant outside of those which are digging ditches and laying pipe, and certain insurance for the protection of the employees and the public, which any business man or contractor should carry; and interest on the investment before it becomes profitable—that is, during the construction; and taxes during the construction.

Q. Anything else?

A. Financing expenses.

Q. Promotion?

By Edward Kibler: I object.

The Court: The objection is overruled.

Q. Go ahead.

A. Promotion would be a little different from financing. And working capital before the plant is producing any earnings?

Q. Anything else?

A. I think those are about all. There are some subdivisions of those, but those are practically all.

Q. What is meant by organization cost?

A. Outside of the actual labor of the men constructing the system there must be officers of the company, who are to look after the business, and purchasing agents and clerks and the office force in general.

Q. Can you state what per cent of the total investment would be represented by these items to which you have referred.

By Edward Kibler: I object.

The Court: The objection is sustained.

By Mr. Montgomery: Note an exception.

Q. Are you able to state what would be the interest charge during the construction of this plant?

By Edward Kibler: I object.
The Court: He may answer if he knows.
By Edward Kibler: Note an exception.

A. The time would naturally be about six months, I would suppose, and on an investment such as is here, I think, as in [illegible] there ought to go in about $4,000 approximately.

By Edward Kibler: I move to rule out the answer.

Q. What do you mean by taxes during the construction?
A. It is taxed whether it is earning anything or not and the taxes must be paid. It adds to the cost up to the time that it is ready to do business.
Q. What do you mean by working capital?
A. Expenses will have to be paid while the plant is being constructed, and while it is being operated, before it pays its own way, and you must have something to pay salaries with and for emergencies. There must be something to meet bills before the people pay for gas.
Q. Can you state how much working capital would be required during the construction of this plant here at Newark?

By Edward Kibler: I object.
The Court: The objection is sustained.
By Mr. Montgomery: Note an exception.

Q. I will ask you whether or not there is anything else which you have not enumerated which should be included in the actual investment in this plant?
A. I think I answered that; I have covered everything.
Q. I will ask you, Mr. Lord, what would be the allowance for the promotion cost of this plant?

By Edward Kibler: I object.
The Court: The objection is sustained.
By Mr. Montgomery: Note an exception.

Q. Are you able to state what would be the taxes upon this plant during the time it was being constructed?

By Edward Kibler: I object. The books are here in the court-house, which will show that.

The Court: He may answer if he knows.

A. I don't know positively.

Q. I will ask you this question, Mr. Lord: What would you say would be the allowance for the cost of the development of this business?

By Edward Kibler: I object.

The Court: The objection is sustained.

By Mr. Montgomery: Note an exception.

Q. I will ask you what you would say would be a fair allowance for working capital of the business of the Newark Natural Gas and Fuel Company?

By Edward Kibler: I object.

The Court: The objection is sustained.

By Mr. Montgomery: Note an exception.

That is all.

R. S. LORD:

Cross-examination.

Examined by Mr. Roderic Jones:

Q. You have stated a number of elements which you say would be proper to be taken into account as intangible elements of value. Now, I will ask you whether those elements would be taken into account in the construction of a plant built piece-meal, the construction extending over twenty-five or thirty years, or whether you would only consider them as proper elements to be considered in the case of the complete construction of a plant of the size of this at Newark?

A. It would change the value to some extent; there would have to be some consideration given to some portion of it.

Q. It would reduce all, or some, of those elements considerably, wouldn't it?

A. Not all. Some would be exactly the same. Some would be reduced.

Q. Some would be wiped out, wouldn't they?

A. I don't think of any that would be wiped out; no, sir.

Q. You have placed the value of the actual physical property of this plant at $309,000?

A. Yes, sir.

Q. What basis of computation did you use in arriving at that result?

A. I determined the amount of material in the plant, and, as near as I was able to, the years in which the different portions were put in. And investigated the cost of piping, some of which I had been doing at the same time, and I knew the labor cost and I learned the material cost and figured it in that way.

Q. On an investment basis?

A. Yes, sir.

Q. That represents $309,000.

A. On the basis of the work done and material furnished in the actual construction.

Q. At the time that the construction was done?

A. Yes, sir; at the time it was performed.

Q. Have you made any allowance for depreciation?

A. Not any allowance in those figures for depreciation. The plant naturally depreciates, and, along other lines, it increases in value.

Q. And those figures include no allowance for depreciation at all?

A. They are cost.

By Mr. Jones: I can shorten this proceeding very materially, if counsel shall agree that the witness shall submit to us a statement of the items which go to make up that

total. I may not want to cross-examine him at all, if I know what they are, and have an opportunity to look at them during the noon hour. I will stop the cross-examination now, if that can be done; and I do not know that I will want to cross-examine him at all.

By J. R. Fitzgibbon: I understand that the city has made a valuation, by engineers, and if they will furnish us with the report of their examination——

Q. (Interrupting): What are the items that you have included in the total?

A. If I was to take all the items, the court would not get done this week.

Q. Well, we will have to stay here until we do get done. I want the items that made up that total?

A. There are a great many items. I have a summary here.

Q. Give us that?

A. The line from Thurston to Newark, $48,180.

Q. That line is absolutely obsolescent, isn't it?

A. I supposed it was in use.

Q. Well, suppose it was not in use, would you still include it in this estimate?

A. I was to make an estimate of the value of the Newark Company's property.

Q. Well, if that was not in use, would you still include it in this estimate?

A. Would I include it in this estimate?

Q. Yes, sir.

A. In the estimate of the cost, I would; yes, sir.

Q. Is a line of that kind, that is not in use, a proper item to be put into the estimate of the physical valuation of this plant?

A. As it is today, do you mean?

Q. Yes, sir.

A. If the line is not in use, and there is no prospect of it being used, it would not have, today, the full value that it had in the first place.

Q. What value would it have under those conditions?

A. Second-hand pipe value.

Q. What would that be?

A. Possibly 50 per cent of the original.

Q. And in case that line is not in use, and there is no probability of it being used, would you reduce that $48,000 item to $24,000?

A. Yes, sir.

Q. What other items have you?

A. High and medium pressure systems, $44,093.

Q. What else?

A. Low pressure system, $88,690.

Q. What else?

A. Sixty regulators, with valves and regulator houses, and so forth, $9,630. Service lines, including cost of setting the meters, but not the meters, $6,216.

Q. What else?

A. Meters, $42,060.

Q. Warehouse stock equipment, tools, horses, wagons, and so forth, $2,596. Office equipment, $3,236.

Q. What next?

A. Real estate, $1,785. Repairs and replacements, $26,301.

Q. What do you mean by that?

A. I mean lines which have been clamped, largely; cast-iron pipe used to be laid entirely with a lead joint, and it, ordinarily, leaked, and it has been found necessary to go over practically all of the city and clamp it, to make such lines effective.

Q. Where did you get your information that it was necessary to go over practically all of the city?

A. I mean, practically all that had cast-iron pipe.

Q. Did you assume that that had been done?

A. I know, from experience, that it has to be done.

Q. Did you assume that it had to be done?

A. No, sir; I knew the number of clamps that were put in, taken from records of the company.

Q. Taken from the records of this company?

A. Yes, sir. I sold them some of the clamps. From the number that had been purchased and installed. As to the cost, I took my own knowledge.

Q. What further?

A. That is the larger part of it; there are some other repairs that are necessary, but that is the largest part.

Q. What is the next item of your list?

A. That is the last.

Q. And the total is what?

A. $309,015.82.

Q. I want to ask you how thoroughly you have checked your estimate with the books of this company?

A. I have not checked them with their books as to the cost in any way.

Q. And if they have books which show the cost of construction from the inception of the company, you would be unable to know whether your estimates agree with the figures that those books show, or not?

A. I checked with some of their records, in determining the amount of material, but I used my own information as to the cost.

Q. As to what amount of material, did you use their records to determine?

A. Since I could not dig up every line in the city to find out the size, I had to consult someone who did know as to what was in each street; and I took my own measurement as to the length. But when I desired to know just how far a six or seven-inch pipe went, I got it from their map, and their man who is competent, and who knows what is in there.

Q. Did you consult with them as to the cost?

A. I perhaps consulted them to a certain extent, on a few items—certain kinds of meters.

Q. Who did you consult?

A. The officers in Newark, and some who kept the books.

Q. Do you know what books you consulted?

A. I couldn't name them; no, sir.
Q. Are you a civil engineer?
A. No, sir.

By Roderic Jones: That is all.

Contract Between The Newark Natural Gas and Fuel Company and The Logan Natural Gas and Fuel Company for the Supply of Gas.

"This agreement made and entered into this 24th day of March, A. D. 1904, by and between The Logan Natural Gas and Fuel Company, a corporation duly incorporated under the laws of the State of Ohio, party of the first part, and The Newark Natural Gas and Fuel Company, a corporation duly incorporated under the laws of the State of Ohio, party of the second part, witnesseth:

"Said party of the first part, for and in consideration of the covenants and agreements of said party of the second part hereinafter set out, covenants and agrees to and with said party of the second part, that it, the said party of the first part, will furnish and deliver to said party of the second part through the receiving and regulating station heretofore constructed by it, the said party of the first part, at or near the corporate limits of the city of Newark, in the County of Licking, in the State of Ohio, natural gas in sufficient quantities to maintain a pressure not to exceed four ounces on the low-pressure line in said city, and to supply the said city and all customers and consumers, public and private, that can be secured by said party of the second part in said city, with such gas for light, fuel, and any and all other purposes, for and during the term of ten years from the 1st day of March, 1903, or such part of said term of ten years as said party of the first part shall have a sufficient supply of natural gas from its gas field or territory to supply the demand therefor in said city of Newark and in such other cities, towns, and villages in the State of Ohio, as may be supplied with such

gas by it, the said party of the first part, it being expressly understood and agreed by the parties hereto that said party of the first part reserves to itself the right to make contracts for furnishing natural gas to other cities, towns, and villages in Ohio and the inhabitants thereof, as fully as if this contract had not been made.

"Said party of the first part further covenants and agrees to use reasonable care and diligence to supply the natural gas required by said party of the second part for its customers and consumers and to use reasonable care to keep its mains and pipes in a serviceable condition and to repair the same as soon as possible in case of accident or any break or breaks therein, but it is in no event to be held liable for any loss or damage to said party of the second part, or to any other person or persons, corporation or corporations, that may occur through its failure to supply gas by reason of any such accident or break or breaks in its said pipe line.

"Said party of the second part, in consideration of the covenants and agreements of said party of the first part, hereby covenants and agrees to and with said party of the first part, to procure, construct, maintain, and operate during the continuance of this contract, pipe lines in, through and along such streets, avenues, alleys, and public grounds in said city of Newark as the business of the said party of the second part may demand, large enough to supply said city and all of its inhabitants who may desire to purchase and use natural gas for any purpose, with such gas; to construct and maintain all connection and service pipes; to keep said lines and pipe connections in good repair and serviceable condition; to make proper connections with and attachments to the pipe line of said party of the first part at said receiving and regulating station of it, the said party of the first part; to locate and furnish an office at some convenient point; to employ and pay all necessary clerks, and other employees required to conduct and carry on the business of furnishing and supplying natural gas to all customers and consumers in said city; to make all contracts for supplying natural gas

to all customers and consumers and all connections for gas supplied to such customers and consumers; to use its best endeavors to secure customers and consumers and to build up and extend said business, by advertising, soliciting by agent or otherwise; and to do all things necessary to manage and conduct said business and furnish natural gas to all customers and consumers in said city during the continuance of this contract.

"Said party of the second part further covenants and agrees with said party of the first part to use first-class material in the construction of its pipes and other work, and to construct the same in a good and workmanlike manner; to assume all expense, cost, labor, and risk incurred in the construction, operation, and management of said service lines and business within the corporate limits of said city of Newark, from its connection with the pipe line of said party of the first part, to pay all taxes and assessments of every kind whatsoever on all of said property in said city.

"It is further covenanted and agreed by and between said party of the first part, and said party of the second part, that the prices to be charged and collected for all natural gas furnished and sold to customers and consumers within said city of Newark under this contract during the continuance of the same shall be regulated and fixed by said party of the first part, but that the price to be fixed shall in no case be less than twenty-five cents per thousand cubic feet, subject to a discount of ten per cent on the price charged, for all gas sold to be used for domestic purposes, when payment thereof is made on or before the 10th day of each month, nor less than six cents per thousand cubic feet for gas sold to be used for manufacturing purposes, that all contracts made by said party of the second part for furnishing gas for manufacturing purposes shall be made in writing and shall contain a provision authorizing said party of the second part to shut off the supply of gas at any time without any notice whatever; and that said party of the second part shall pay to said party of the first part at the general office of said party of

the first part, wherever the same may be located, on or before the fifteenth day of each and every month during the continuance of this contract, seventy per cent of the gross amount or sum of money received for all gas sold during the preceding month, and that it shall have and retain for itself the remainder of said gross amount or sum of money so received for gas sold during said preceding month.

"It is further covenanted and agreed by and between said party of the first part and said party of the second part that said party of the second part will do, or procure to be done, all plumbing necessary to make house and service connection for consumers at a reasonable price or rate; furnish all mixers to be used by consumers, at a reasonable price or rate; require all plumbers to procure a permit and mixers at its office before making any house connections for fires, or service with the pipe lines of the said party of the second part; require all consumers to sign a contract in triplicate for gas, before house connections are made with its pipe line, or gas is turned into the house or service pipe of such consumer; require all consumers to sign additional contracts for any additional fires or mixers obtained, and plumbers to procure permits at its office before making connection for such additional fires or service; and require the numbers of all mixers to be included in and endorsed on all contracts for gas, and further that it, the said party of the second part, will forward to said party of the first part, as soon as made, a copy of all contracts with consumers and will make and keep in its office a copy of each of such contracts, together with a full and complete record of the same and of all mixers used, and will, also, keep at its said office such books of account as will clearly and fully show all accounts and contracts with consumers, and all other transactions and matters relating to the business of it, the said party of the second part, which said accounts, books, contracts and records, together with any and all other papers relating to or connected with the business and matters of it, the said party of the second part, under this agreement and contract, shall be, at all reasonable

and proper times, day and night, open to examination and inspection by the officers, agents, attorneys and employees of the said party of the first part, and that it, the said party of the second part, will, by its officers, agents and employees, aid and assist said officers, agents, attorneys and employees of said party of the first part in making such examination and inspection whenever requested to do so by them.

"It is further covenanted and agreed by and between said party of the first part and said party of the second part that said party of the second part will, at the end of each and every calendar month during the continuance of this contract deliver to said party of the first part, at the general office of said party of the first part, a statement showing in detail the amount collected for gas sold and delivered to consumers during said month.

"It is further covenanted and agreed by and between said party of the first part and said party of the second part that if said party of the second part, shall, for a period of thirty days, neglect and fail to pay the said party of the first part any money due to it under this contract or shall neglect and fail to faithfully and fully perform each and every covenant and agreement herein stipulated to be performed by it, the said party of the second part, this contract shall, at the option of said party of the first part, be canceled and annulled and all rights of said party of the second part hereunder forfeited, and said party of the first part, shall in such case, have the right to enforce by action, or actions, at law or in equity, the payment of any money due or to become due to it, the said party of the first part, and any and all claim or claims for damages, or other claim or claims that it, the said party of the first part, may have against said party of the second part, by reason of the premises.

"And it further covenanted and agreed by and between said party of the first part and said party of the second part, that all of the covenants, agreements, and stipulations hereinbefore set out to be kept and performed by said party of the second part, shall be binding upon and enforceable

against its successors and assigns, by said party of the first part, its successors and asigns, and that all of the covenants, agreements and stipulations hereinbefore set out to be kept and performed by said party of the first part shall be binding upon and enforceable against its successors and assigns, by said party of the second part, its successors and assigns, and that no assignment of this agreement shall be made by said party of the second part, its successors and assigns, without the consent in writing of said party of the first part, its successors and assigns.

"In testimony whereof, the said The Logan Natural Gas and Fuel Company has hereunto caused its corporate name and seal to be signed and affixed by Jesse C. McDowell, its president, and Hugh P. Brawley, its secretary, and the said The Newark Natural Gas and Fuel Company has hereunto caused its corporate name and seal to be signed and affixed by Samuel A. Wheeler, its president, and Robert P. Miller, its secretary, on the day and year first hereinbefore written and set forth.

"THE LOGAN NATURAL GAS
AND FUEL COMPANY,
By JESSE C. McDOWELL,
Its President.
HUGH P. BRAWLEY,
Its Secretary.

[Seal The Logan Natural Gas and Fuel Company.]

THE NEWARK NAT. GAS &
FUEL CO.,
By S. A. WHEELER, *Its President.*
R. P. MILLER, *Sec't'y.*"

[Seal The Newark Natural Gas & Fuel Company.]

THIS PAGE BOUND VERTICAL IN BOOK

STATEMENT SHOWING NET EARNINGS FROM GAS OPERATIONS - INTEREST EARNINGS - DIVIDENDS PAID AND AMOUNT PLACED TO CITY PLANT FOR BETTERMENTS
THE NEWARK NATURAL GAS AND FUEL COMPANY - FOR YEARS 1902 TO 1911 INCLUSIVE

	1902	1903	1904	1905	1906	1907	1908	1909	1910	1911	TOTAL
Investment											
Main	235,922.27	216,914.27	216,914.27	216,914.27	216,914.27	216,921.77	214,921.77	37,255.68	37,255.68	37,255.68	
Field	281,880.29	289,925.11	292,648.05	--	--	--	--	--	--	--	
Town	183,187.96	214,547.65	227,672.44	242,419.55	253,348.58	251,713.62	258,519.34	259,456.93	263,282.70	266,633.34	
Total	700,993.52	721,387.03	737,234.76	459,333.82	470,262.85	468,635.39	472,441.11	296,712.61	300,538.38	302,889.02	4,930,368.4
Gas Sold M Feet	740,770	1,886,326	1,479,562	1,477,564	1,591,875	1,640,565	1,436,857	1,456,130	1,477,392	1,505,928	
Amount Received for Gas Sold	88,390.13	179,342.87	196,290.50	199,599.05	219,508.94	295,389.54	212,793.30	218,252.09	235,442.67	252,954.26	
Paid for Gas Purchased	--	77,181.69	122,010.53	142,916.37	153,676.55	144,794.98	149,054.05	152,785.71	164,809.89	177,068.02	
Net Received for Gas	88,390.13	102,161.18	74,279.97	56,682.65	65,832.39	70,594.56	63,739.25	65,466.38	70,632.78	75,886.24	
Misc. Earnings from Gas	--	233.35	761.75	7,093.25	5,096.20	11,963.85	3,675.65	72.80	--	--	
Total Earnings from Gas	88,390.13	102,394.53	75,041.72	63,577.90	70,929.19	82,558.41	67,414.90	65,539.58	70,632.78	75,886.24	
Less Operating Expenses	18,992.94	38,657.74	44,789.78	35,106.84	22,763.16	22,073.96	23,739.30	30,833.86	25,931.79	27,281.50	
Net Earnings from Gas Operations	69,397.19	63,736.79	30,251.94	28,471.66	48,166.03	60,484.45	43,675.60	35,060.02	44,700.99	48,604.74	
Interest Earnings	1,167.07	7,797.36	5,991.25	2,788.97	19,926.47	9,031.35	9,367.17	19,070.13	29,207.69	--	104,337.4
Dividends Paid	--	--	180,000.00	--	--	--	--	206,000.00	--	600,000.00	986,000.0
Betterments for Year	--	21,389.69	13,126.79	14,767.11	10,869.03	1,554.96	3,805.72	3,937.59	3,825.77	3,350.64	82,645.2

THE STATE OF OHIO,
Licking County, ss:

In the Court of Common Pleas, April Term, A. D. 1915.

Hon. H. W. Jewell, Judge.

#16000.

THE CITY OF NEWARK, OHIO, by FRANK A. BOLTON, *Solicitor, Plaintiff,*

vs.

THE NEWARK NATURAL GAS AND FUEL COMPANY, *Defendant.*

Opinion.

JEWELL, *J.:*

This is an action brought by the city of Newark to enjoin the Newark Natural Gas and Fuel Company from charging and collecting for gas furnished to the citizens of Newark an amount in excess of the price fixed by an ordinance passed by the city council on the 6th day of March, 1911.

The council of the city of Newark passed an ordinance, by the terms of which the defendant was required to furnish to the citizens of Newark, for a period of five years, gas at the rate of twenty cents per thousand feet, with a discount of ten per cent if payment was made before the 10th day of the succeeding month.

This ordinance was not accepted by the company, and immediately thereafter it proceeded to notify its consumers by publication that it would charge them twenty-five cents per thousand cubic feet, less a discount of ten per cent if paid before the 10th of each month, and that unless this price was paid the supply of gas would be discontinued.

On April 25 the city of Newark filed its petition and secured a restraining order preventing the company from

turning off the supply of gas, as threatened in its publications. Since the filing of the petition the citizens of Newark have been paying the higher rate, and the increase over eighteen cents is retained by the Newark Trust Company to abide the final decision of this case.

The council in passing this ordinance acted under the authority granted in section 3982 of the General Code, which reads:

> "The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge," etc.

Under the pleadings and evidence the ultimate fact to be determined is: Is eighteen cents net per thousand cubic feet an unreasonable rate?

The evidence in the case covers a wide range, on account of the nature of the issues involved. Much of it is difficult to understand and has required a large amount of labor on the part of the court to analyse. In fact, one must be a prophet to fully comprehend some of the evidence, especially that part relative to the nature of the gas supply.

It is the contention of the defendant that the ordinance in question is unreasonable; that it is in violation of section 19 of article 1 of the bill of rights of Ohio, and of section 1, article 14, of the Amendments of the Constitution of the United States, in that it deprives the defendant of the equal protection of the law and attempts to compel it to furnish gas without an adequate return.

On the 21st day of February, 1898, the city of Newark granted the defendant the right to lay its pipes through and over the streets of Newark, for the purpose of supplying gas

or fuel to the inhabitants for a period of twenty-five years, and fixed the maximum rate to be charged for a period of ten years from the passage of the ordinance at twenty-five cents per thousand cubic feet. The company, in writing, on March 21, 1898, accepted the ordinance and has since supplied the city of Newark with gas.

No further attempt was made to regulate the price of gas until the passage of the ordinance in question.

The company was incorporated, with a capital stock amounting to $81,000. No additional capital has been placed in the company, except such as has been taken from the earnings from year to year. The company has been under three separate managements. From 1889 to 1898 it was under the Everett management; from 1898 to 1902 under the Logan management; and from 1902 to the present time under the management of the Union gas corporation of Pittsburgh.

It is not a debatable question that private property devoted to public use is subject to regulation. People who invest their means in public utilities, or property devoted to public use, do so with the knowledge that such property is subject to regulation. In other words, when private property becomes affected with a public use it ceases to be solely private property.

In the leading case of Mumm *vs.* Illinois, 94 U. S., 113, it is said:

> "Property does become clothed with a public interest when used in a manner to make it a public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

Although the right to regulate the price of gas must be conceded to be vested in the council of the city of Newark,

nevertheless it is equally well settled that a rate fixed will be enjoined as invalid under the 14th Amendment of the Constitution of the United States unless the same is just, both to the public and the owner. A rate that will not return a fair investment on the value of the property used amounts to the taking of property for the public use without compensation and is invalid.

By what rule or standard are we to determine the reasonableness or unreasonableness of this rate?

In the case of Diego Land Company *vs.* National City, 174 U. S., 739, the rule is clearly defined:

> "What the company is entitled to demand in order that it may have just compensation is a fair return on the reasonable value of the property at the time it is being used for the public."

In the case of Wilcox *vs.* Gas Co., 212 U. S., 19, it is said:

> "The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and to the public. There must be a fair return on the reasonable value of the property at the time it is being used for the public."

R. H. Lord places the physical value of the Newark plant at $309,000. The book value of the plant on December 31, 1911, was $302,889.02. This value includes an item of $60,000 for franchise, which is purely fictitious.

For the year 1912 the State Tax Commission fixed the value of the plant at $435,670. It must be kept in mind that the book value of the plant is ascertained by adding to the book value of a certain year the amounts expended in better-

ments the preceding year to show the value for that year. Nothing has ever been set aside for depreciation. The book value in 1902 was $183,187.06.

It has been repeatedly held that a deduction for depreciation from use and age must be made in determining the reasonableness or unreasonableness of a rate. This was held in the case of Knoxville *vs.* Knoxville Water Co., 212, U. S., 1:

> "A deduction for depreciation from age and use must be made from the estimated cost of producing a waterworks plant, in order to determine the present value of the tangible property for the purpose of testing the reasonableness of the rates fixed by a municipal ordinance."

It is certainly apparent to counsel that it is difficult to determine the value of the Newark plant when nothing has ever been charged off for depreciation and all betterments charged or added to the value of the plant, and this becomes more apparent when we know that gas plants do deteriorate in value from year to year.

We are not inclined to fix a value on the Newark plant in excess of the value placed on the property by the company, and from which must be deducted the valuation placed on the franchise, viz., sixty thousand dollars. The franchise of the company cannot be considered as valuable in determining the reasonableness of this rate, for the plain reason that the city of Newark has had from the time of granting this franchise the power and authority to regulate the price of gas.

The ordinance in question has been in force for more than two years. The increase in price has been paid, but this increase does not enter into the evidence, as the amounts given by the auditor of the company do not include this increase.

During the whole period covered by the Union Gas Com-

pany management, from 1902 to the adoption of this ordinance, the company charged the citizens the eighteen-cent net rate. On March 24, 1904, a contract was entered into with the Logan Natural Gas & Fuel Company to furnish gas to the Newark company for a period of ten years. This contract expired March 1, 1913, having commenced by the term of its provisions on the 1st day of March, 1903. The contract provides that the Newark company shall fix and regulate the price of gas, with the proviso that such price shall in no case be less than twenty-five cents per thousand cubic feet, subject to a discount of ten per cent, for domestic purposes, not less than six cents for manufacturing purposes, and that from the amounts realized the Logan company shall receive seventy per cent of the gross amount, and the Newark company retain thirty per cent.

The Logan company never exercised its right by demanding the higher rate specified in this contract, but sold gas to the Newark company at the old rate—that is, the Newark company received for industrial gas for the year 1911 an average of 11.6 cents, out of which amount is retained 3.48 cents, and for domestic gas the Newark company received 16 cents, out of which is retained 5.4 cents.

For the year 1911 the Newark company received from its operations $234,906.99. It paid to the Logan company for gas $164,434.89, and its operating expenses amounted to $27,281.50. Deducting the total amount expended, namely, $191,716.39, from the income leaves a net earning amounting to $43,190, or a net earning amounting to over fourteen per cent on the investment as carried by the company on its books, which includes the sixty-thousand-dollar franchise.

And for the year 1910 the Newark company, under its contract with the Logan company, realized over 24½ per cent. In round numbers the company expended in 1910 $191,000, and received from all sources $265,000, leaving a net earning of $74,000.

The least earning under this contract was made in 1904, when the company expended approximately $167,000 and received $203,000, leaving a net earning of $36,000, or a little less than 5 per cent on its investment.

Accepting the figures and valuation of the company as true, we find that the average rate of net earnings from 1902 to 1911 is over nine and one-half per cent.

But it is contended by counsel for defendant that the contract entered into by the Logan company with the Newark company, and which expired March 1, 1913, was in no manner a protection to the Newark company, for the reason that the Logan company had the right to demand a higher rate than provided by this ordinance.

This contention is not sound, for the simple reason that it never exercised its option by demanding the higher rate, but furnished to the local company gas under the old rate.

The net earnings of the Newark company from 1902 to 1911 amount to $486,694.13. It can hardly be questioned but what these figures represent a very profitable business, and a rate that will permit a company to earn such dividends cannot be held to violate any constitutional provision.

The authorities are uniform in holding that a court ought not to declare an ordinance fixing the rate illegal unless the case is clear. The money held by the Newark Trust Company, which represents the increase in rate, was accumulated during the period when the Newark company had a contract with the Logan company to furnish it gas and during the time the Logan company did actually furnish gas.

We have been much impressed with the great volume of evidence tending to show the cost of production of gas. That the gas fields are being rapidly depleted and that the cost of production is increasing must be admitted. But the contention of the Logan company that gas in the main lines, without transportation charges and including an eight per cent profit, cost the Logan Natural Gas and Fuel Company in 1911 20.01 cents is not supported by the evidence. The eight per cent profit is computed upon an erroneous

and incorrect value. It must be computed in determining the reasonableness of a rate upon the fair value of the property at the time it is used by the public. The total investment of the Logan company on December 31, 1911, as shown by its books, amounts to $10,837,542.37. This amount is ascertained by simply adding the betterments of each year to the previous year, with no deduction for depreciation. The book value cannot, therefore, represent even approximately the value of the plant, and before any court would be justified in granting any relief against a certain rate the company or individual ought to be required to prove the actual value of the property devoted to the public use at the time of the investigation.

The testimony shows that the Upham Gas Company sells gas to manufacturing plants at Mt. Vernon for ten and twelve cents, and that it receives for its domestic use eighteen cents net, although its franchise permits it to charge twenty cents. The Columbus Natural Gas Company is selling gas at the corporate limits of the city of Columbus for twelve and one-half cents per thousand cubic feet under a contract entered into for five years in September last.

From those limited facts we are forced to conclude that the Logan Gas Company's estimate as to its cost of producing a single foot of gas is erroneous. Our conclusion is that the Newark Natural Gas & Fuel Company has under this ordinance made a fair profit on its investment, and that the excess held by the Newark Trust Company rightfully belongs to the citizens of Newark. Whether this ordinance will permit the company to earn a profit in the future we cannot state, and the company ought to be permitted to apply to the court for relief in the event it does not.

A decree may be entered in favor of the plaintiff with costs.

Exceptions.

Appeal bond, $500.

Motion for new trial overruled and exceptions.

Court of Appeals for Licking County.

THE CITY OF NEWARK, by FRANK A. BOLTON, *Solicitor,*
vs.
THE NEWARK NATURAL GAS & FUEL COMPANY.

Decided May Term, 1914.

Public Utilities—Control of Rate for Natural Gas—Elements to be Considered in Fixing Rate—What is Contemplated by the Statute Giving Municipal Councils Power to Regulate—Court Will Not Declare a Rate Confiscatory, Unless.

1. The power given to municipalities by the Ohio statute to regulate the price of natural gas contemplates an impartial and thorough investigation into all the facts for the purpose of doing justice to both the corporation and the public by establishing reasonable rates on the one hand and on the other compensation which will be just to the company.
2. The elements to be considered in fixing the rate for natural gas are the amount of net profit which may be earned under a fixed rate, and whether the rate as so fixed will yield a fair return on the investment, depreciation in the value of the plant and the risk attendant on the enterprise considered.
3. The fixing of the rate of twenty cents per thousand for natural gas for the city of Newark cannot be regarded as confiscatory, notwithstanding some depletion in the supply from the wells, when it appears that the supply is still four times the consumption in that field, and the company for some time paid dividends of ten per cent under a rate of only eighteen cents, and for several years has paid dividends under a twenty-cent rate, and other localities in the same field are being furnished gas at the eighteen cent rate at the present time.

4. Moreover, a rate cannot be declared confiscatory unless clearly shown to be so by actual experience, and particularly will a court refuse so to declare where a mandatory injunction to enforce the provisions of the ordinance fixing the rate complained of has been in force for three years and no showing is made by the company of the result of its operations during that time.

Frank A. Bolton, Roderic Jones, Kibler & Kibler, and Ralph Norpel, City Solicitor, for plaintiff.

S. M. Douglas, Eugene Mackey, and Fitzgibbon & Montgomery, *contra.*

SHIELDS, J. (POWELL, *J.*, concurs; VOORHEES, *J.*, dissents):

On March 6, 1911, the city council of the city of Newark, Ohio, duly passed a city ordinance fixing the maximum price of natural gas to be charged by the Newark Natural Gas & Fuel Company, its successors or assigns, for the period of five years next ensuing at 20 cents for each thousand cubic feet of gas used or consumed by all persons, firms or corporations using or consuming the same, with a discount of 10 per cent allowed if payment was made on or before the tenth day of the succeeding month. Declining to accept the provisions of the ordinance, the defendant company, which for years had been and then was supplying said city and its citizens with gas under an ordinance of said city passed February 21, 1898, immediately caused notice to be given to its consumers of gas by publication that on and after the April, 1911, reading of meters the price to be charged for gas would be 25 cents for each thousand cubic feet, subject to a discount of 10 per cent if paid on or before the tenth of each succeeding month, and that unless said price was so paid the further supply of gas to said city and its citizens would be discontinued. Soon after said publication was made a petition was filed by the city of Newark, by Frank A. Bolton, its solicitor, in the Court of Common Pleas of Licking County, Ohio, to

enforce by mandatory injunction the provisions of said city ordinance passed March 6, 1911.

Stating it more fully and at length, said petition recites:

That the said Frank A. Bolton is the duly elected, qualified and acting solicitor of the city of Newark, Ohio, a municipal corporation, and that said action is brought by direction of its city council. That the defendant, the Newark Natural Gas & Fuel Company, is a corporation and is furnishing natural gas for fuel and light to said city and its inhabitants by virtue of a franchise granted by the said city council by ordinance passed February 21, 1898, by the terms of which there was granted to the defendant company the right and privilege of laying pipes in and through the streets and alleys and public grounds of said city for the purpose of supplying and conveying natural gas or fuel gas to the inhabitants of said city for a period of 25 years. That for the period of 10 years from the passage of said ordinance, the defendant company was entitled to charge consumers of gas, who are inhabitants of said city, for gas furnished at the rate of 25 cents for one thousand cubic feet. That within ninety days after the passing and taking effect of said ordinance the acceptance thereof by said defendant was required to be filed with the said city council. That said ordinance was duly published as required by law. That within ninety days from the passing and taking effect of said ordinance, to wit, March 21, 1898, the defendant company accepted the same in writing. That a copy of said ordinance and the acceptance thereof by the defendant company is attached to said petition. That from the date of the passage of said ordinance franchise up to the 6th day of March, 1911, said city council passed no further ordinance regulating the price to be charged by the defendant company to said city and its inhabitants for fuel and light, or either. That ever since the passage and acceptance of said ordinance the defendant company has been continuously, and now is supplying gas to said city and its inhabitants by virtue of the rights and privileges granted by said ordinance.

That on the said 6th day of March, 1911, said city council duly passed an ordinance regulating and fixing the maximum price the defendant company may charge consumers thereof, whether the city itself or its inhabitants, under said franchise for the period of five years at the rate of 20 cents per thousand cubic feet of natural gas for the fuel and light, meter measurement, with 10 per cent discount on all bills paid before the 10th of each succeeding month. That said last-named ordinance was on the 9th day of March, 1911, duly signed, approved by the mayor of said city, and was published as required by law, a copy of which ordinance is attached to said petition. That said last-named ordinance is now in full force and that the price as therein fixed by said city council is the same price that the defendant company has been and is now charging said city and its inhabitants who have been and now are consumers of gas in said city, and ever since the defendant began furnishing gas under the ordinance granting said franchise. That the defendant company had due knowledge and notice of said ordinance passed March 6, 1911.

That the defendant company is notifying and has notified said city and the inhabitants thereof that on and after the April, 1911, reading of meters the price charged for gas would be 25 cents for one thousand cubic feet, subject to a discount of 10 per cent if paid on or before the tenth day of the following month, and it threatened that unless said price is paid by said city and its inhabitants on or before May 10, 1911, the defendant company would stop the supply of gas and refuse to furnish gas for fuel and light to said city or any of the inhabitants who refused to pay said price so fixed by the defendant company. That the said defendant company insists upon its right to make the price for all gas furnished to said city and its inhabitants, on and after April 1, 1911, the sum of 25 cents per thousand cubic feet, subject to said discount of 10 per cent, and no less, and unless restrained by the court, all consumers of gas furnished by the defendant company would be required to pay 25 cents per thousand

cubic feet, subject to said discount on and after May 1, 1911, contrary to the provisions of said ordinance of March 6, 1911.

That for the purpose of avoiding a multiplicity of suits for the defendant company's threatened refusal to comply with the provisions of said ordinance of March 6, 1911, said solicitor brings this suit.

The plaintiff further says that said city and its inhabitants are each and all of them without remedy at law and can get no relief from the processes of a court of equity, and they have no adequate remedy at law.

Wherefore, the plaintiff prays that on the final hearing of this cause the defendant company may be perpetually enjoined from charging, collecting, or in any manner attempting to collect from said city, or any of its inhabitants any other, greater or further sum for gas by it delivered for heat and light than the maximum sum or rate fixed by said ordinance passed March 6, 1911, and that the defendant company be enjoined to specifically perform said ordinance and franchise, and that pending the final hearing of said case a temporary injunction issue to a like effect, restraining the defendant company in like manner and for all other and further relief to which said city or any of its inhabitants may be entitled in equity.

Upon the foregoing petition being filed, a temporary injunction was allowed to issue as prayed for in said petition, except as to the specific performance of said ordinance, by Chas. W. Seward, judge of the court of common pleas of said county.

In its amended answer to said petition the defendant company sets up four separate defenses, and for its first defense says:

> "It denies that it threatens or has threatened that the defendant company would stop the supply of gas and refuses to furnish gas to said city or any of its inhabitants who refuse to pay the price fixed by said

defendant company; that while it admits that said ordinance of March 6th, 1911, was passed in due form by said city council, fixing the price that the defendant may charge consumers, it avers that said ordinance is unreasonable, and that the rate fixed denies to the defendant any adequate profit for the five years next ensuing and operates as a fraud upon the property rights of the defendant, and is therefore unreasonable and void, and it denies all the other averments in said petition not expressly admitted in said ground of defense set up in said amended answer.

"For a second defense the defendant says that said ordinance of March 6th, 1911, is contrary to and in violation of section 1 of article I of the bill of rights of the constitution of the State of Ohio and is therefore null and void and of no effect for the reason that said ordinance is violative and a denial of the due protection and possession of the property of said defendant without its consent.

"For a third defense the defendant says that said ordinance of March 6th, 1911, is contrary to and in violation of section 19 of article I of the bill of rights of the constitution of the State of Ohio, and is therefore null and void and of no effect, for the reason that it is the taking of private property without due process of law in that said ordinance attempts to compel the defendant to furnish gas at a price without just compensation or profit and without any equivalent or just compensation in money and against and without the consent of the defendant.

"For a fourth defense the defendant says that said ordinance is contrary to and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States and is therefore null and void and of no effect, for that it is a denial to this defendant of the equal protection of the laws and with-

out due process of law in this, that it tends and is designed to compel the defendant company to furnish gas for a period and at a price without adequate return, compensation or profit and without the consent of the defendant.

"The defendant prays that the temporary restraining order granted herein may be dissolved; that the prayer of the petition be denied and that said ordinance of March 6th, 1911, be declared unreasonable, null and void, and for all proper relief."

After a demurrer was overruled to the second and third defenses of the defendant company's amended answer, a reply was filed by the plaintiff, and replying to the first defense therein it denies that said ordinance of March 6, 1911, is unreasonable, and it denies that the rate fixed by said ordinance denies to the defendant company any adequate profit for the five years next ensuing and operates as a fraud upon the property rights of the defendant and is therefore unreasonable and void.

And for a reply to the second, third and fourth defenses of said defendant's amended answer the plaintiff denies each and all of the allegations therein contained.

The case comes into this court by appeal from the judgment of the court of common pleas of said county and was tried upon the evidence introduced in support of the issues raised by the pleadings filed in the case.

While there are several defenses pleaded in the amended answer of the defendant company, when taken together, they substantially raise the same question and make the same defense, namely, that the ordinance of March 6, 1911, is constitutionally invalid, both under the Constitution of the United States and under the constitution of the State of Ohio, because said ordinance fixes a maximum rate to be charged by the defendant company for the supply of natural gas to the city of Newark and its citizens for the period of

five years from the date of its passage and taking effect that is both unreasonable and confiscatory in its effect, and that said ordinance is therefore null and void.

The power given by statute to the council of a municipality to regulate the price of natural gas is to be found in section 3982 of the General Code, which provides that:

> "The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas-light and coke companies or companies for supplying water for public or private consumption are established, or into which their wires, mains or pipes are constructed may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or heating purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water furnished to such corporation or individuals, than the price specified by ordinance of council," etc.

It will thus be seen that the term "regulate" is employed in the foregoing statute. Evidently the statute contemplates that the power thus given in fixing rates shall not be exercised short of an impartial and thorough investigation into all the facts with the ultimate object of doing justice both to the public-service corporation and to the public. It does not contemplate an arbitrary fixing of rates irrespective of the rights of the corporation or the public, but reasonable rates and just compensation, and to do otherwise would be violative of the spirit of the statute and of public duty. What was actually done in the premises by the city council is not now before this court and the presumption is, in the absence of proof to the contrary, that it acted with due regard

to the rights of both the corporation and the public. And that it was clothed with power to regulate the price of gas to be furnished by the defendant company is not open to question.

Said ordinance having been passed by the council, signed and approved by the mayor and having become operative after publication, what then? The defendant company not only refused to comply with its terms, but notified its consumers of gas that on and after the April, 1911, reading of meters that the price to be charged for gas would be 25 cents for one thousand cubic feet, subject to a discount of 10 per cent if paid on or before the 10th day of the succeeding month. It is fair to assume that this action was taken for the reasons set forth in the defendant company's amended answer.

As has already been pointed out, the city council has the power to regulate by ordinance the price of gas in municipalities, but this power does not reside in the court, whose province and duty it is to judicially declare whether or not the rate fixed in said ordinance is reasonable or otherwise. With this duty discharged its power is exhausted. What constitutes reasonable rates for this purpose is a subject that has given the courts no little concern. The various conditions that may be present in one case may be absent in another. Hence there is no uniform rule laid down to be followed by courts, for no particular rates can be established for all cases. Quoting from the opinion of Justice Peckham in the case of *Wilcox et al. vs. Consolidated Gas Co.,* 212 U. S., 19-48:

> "There is no particular rate of compensation which should in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the busi-

> ness is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk the less right to any unusual returns upon the investment. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference than can be obtained from an investment in Government bonds or other perfectly safe security."

It will thus be seen that locality, risk and other considerations may enter into the reasonableness of the rates fixed. And in fixing such rates the rights of both the corporation and the public are to be equally considered. The ends of justice would not be met by disregarding the interests of either. On the one hand, the company is entitled to a fair return upon the reasonable value of that which it employs for the public convenience, and on the other hand what the public is entitled to demand is that no more be exacted from it than what such company furnishes is reasonably worth.

In *Covington & Lexington Turn Pike Road Company vs. Sandford,* 164 U. S., 578, 597, 598, Justice Harlan, speaking for the court, says:

> "In short, each case must depend upon its special facts, and when a court, without assuming itself to prescribe rates is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is

to take into consideration the interests, both of the public and of the owner of the property, together with all other circumstances that are to be considered, by determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law.

"The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what, under all the circumstances is such compensation for the use of its property as will be just, both to it and to the public."

Again, in *San Diego Land & Town Company vs. National City,* 174 U. S., 739:

"What the company is entitled to ask is a fair return upon the value of that which it employed for the public convenience."

In *Wilcox et al. v. Consolidated Gas Company, supra,* it is held that:

"The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and to the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public."

Numerous other authorities might be cited sustaining this same view, but from the authorities cited we think it is apparent that the law enjoins upon a legislative body, such as a city council, is fixing rates for any public-service corporation that they be so fixed as to be just both to the corporation and to the public.

Is the rate fixed by the ordinance in question reasonable or otherwise? Was it fixed with reference to the rights of this corporation and of the public? If it was and it is reasonable, the relief asked for by the defendant company should not be granted, but if it was not and it is unreasonable and it denies to the defendant company equal protection of the laws in attempting to compel it to furnish gas for a period and at a price without adequate return, without its consent, then such relief under favor of the Fourteenth Amendment to the Constitution of the United States should not be denied.

We are therefore confronted with the inquiry, How is this court to determine whether or not the rate is reasonable or otherwise? What is the test to be applied? This question has been before the Federal courts at various times and the rule there adopted in determining the reasonableness of rates is:

First, to ascertain the value of the plant of the corporation.

Second, to determine, if possible, the total amount of the net profits which it can earn under the rate fixed.

Third, to determine whether the amount of said profits is sufficient to provide a fair return on the reasonable value of the plant.

A vast amount of testimony was introduced under these different heads, especially relating to the cost of the defendant company's plant, including promotion and organization cost, construction and engineering work, the risks incident to the production and distribution of gas, the necessity of maintaining a large reserved area of gas-developed territory to meet exigencies liable to arise in the various sources of supply, the market price of gas delivered at Newark, etc. Indeed the variety of subjects is so great and the testimony relating thereto so voluminous, a large part of which consists of expert testimony, it would seem that their intelligent solution would be aided by the services of a well-trained

and experienced gas expert. But in its analysis the case will be found to present legal questions, the solution of which may be helpful in enabling the court to reach a better understanding of the facts in the case.

Let us take up and consider the first proposition, namely, the value of the plant of the defendant company and the elements that should be considered in arriving at such value and when the valuation should be determined.

In *McQuillan on Municipal Corporations,* 1750, the rule is stated as follows:

> "The only practical test for determining the amount on which the public-service company is entitled to a fair return is the present value of the property of the company at the time of the inquiry."

In *Dillon on Municipal Corporations,* 1331, it is laid down that:

> "When the inquiry is directed to the reasonableness of the compensation, founded upon a fair return to the corporation upon the value of the property used for the public, the value of such property is the basis of that inquiry."

Under the rule laid down by the foregoing authorities, supported by numerous adjudicated cases, the rule appears to be well established that the value of the property at the time of the fixing of the rates is the basis of valuation to be employed in determining the reasonableness of such rates.

The testimony shows that the defendant company was incorporated in 1889 with a capital stock of $81,600, and that no additional capital has ever been put into it for any purpose except such as has been taken out of the earnings of the company.

The history of the company consists of three periods, the Everett management, extending from 1889 to 1898; the

Logan management, from 1898 to 1902, and the Union Gas Corporation, from 1902 to the present time.

The value of this property rests upon evidence furnished largely by the defendant company, supplemented by evidence covering the result of an examination made of its books by an expert accountant. As tending to show the value of the defendant company's property, R. S. Lord, a witness for said company, testified that he was employed by it in March, 1912, to examine said property and then placed a value on it at $309,000. In estimating such value the original cost of much of the material employed in the construction of said company's plant seems to have been based upon an examination of the books of the company and information furnished him. In making such estimate he testified that 50 per cent deduction from the original cost of the line between Newark and Thurston, if the same is not in use, should be made, namely, $24,000; that no allowance for financing expenses, or organization cost, or interest charges, etc., during the construction of said plant was included, and that no allowance was made for general depreciation of the plant covering a period of some ten years. The book value of the plant December 31, 1911, was shown to be $302,889.02, exclusive of allowance made for depreciation and franchise value. In June, 1902, the book value was shown to be $183,187.96, which amount was made up of various items, as shown on page 541 of the record. In this estimate was included also an item of $60,000 for "rights of way." A. J. Drolet, general auditor of the Union National Gas Corporation of Pittsburgh, a witness for the defendant company, testified that, although the books of said company showed that by an inventory then taken the franchise value was then entered on said books at $3,500, said sum was increased to $60,000 in six months after that time. The record on pages 542, 543, and 544 shows that said witness testified upon this subject as follows:

"Q. Now, under the head of rights of way, what do you mean by that?

"A. That is an account that we have. It is a franchise account. It is supposed to cover intangible values. We merely put it down. That is all; we had so many thousand consumers, and an investment of so much, and knowing about how much it ought to be per consumer, we noticed that there was a certain amount missing from the investment. We could not ascertain just where it was. It is a matter that has been ascertained by the accounting department, we are not authorities on that.

"Q. As a matter of fact, it is simply a value that is put upon the franchise.

"A. Yes, sir, covering all intangible value.

"Q. You had an inventory taken in 1902, in June?

"A. Yes, sir, I think so.

"Q. And that right of way was placed at $3,500?

"A. Yes, sir.

"Q. And was increased in December of the same year to $60,000?

"A. Yes, sir. Because we did not believe $3,500 covered it.

"Q. Well, it did not cost anything?

"A. It is a question. I don't know. We knew the plant was worth more than $123,000.

"Q. Your schedule shows the actual earnings and actual expenses of your company?

"A. Yes, sir. This was merely an inventory. I haven't that list of pipe and meters; that is all that I received in the Pittsburgh office—this list of material. In view of the fact that there was no absolute physical appraisement taken of the plant, nothing else was left for us but to extend the figures at what we thought was right.

"Q. And you voluntarily increased the investment of the company from $122,638.00, by adding $60,000.00?

"A. Yes, sir.

"Q. In six months' time?

"A. That is a feature which we had omitted in the opening.

"Q. That was an inventory?

"A. Yes, sir, of the physical property.

"Q. In June, 1902?

"A. Of the physical property, yes sir.

"Q. The physical property in June, 1902, was $122,000?

"A. That is what we thought it was. We put $60,000 as being intangible.

"Q. And the $60,000 which you added was the franchise value?

"A. Yes, sir. What we estimated was the franchise value.

"Q. And you have nothing on your books to show that you paid anything at all for the franchise?

"A. Nothing at all, no sir."

It would appear that if the foregoing illustrates the modern methods of bookkeeping in capitalizing corporation values, investigation may be helpful in disarming criticism that frequently follows where trust and confidence are fortified by book figures.

Evidence was also offered of the valuation placed upon this property by the State Tax Commission for the years 1911 and 1912 at $572,450 and 435,670, respectively, while the value placed upon practically the same property by the company itself in the sworn statement of W. J. Broder, its secretary, for the years 1908, 1909, and 1910 (as appears on page 398 of the record) was $41,996, $47,114, and $47,706, respectively. By the authorities this evidence is

held to be immaterial for valuation purposes except as it tends to show the value placed upon the property by the company.

It is difficult to arrive at anything like a satisfactory conclusion as to the value of the company's property in March, 1911, when it is considered nothing else was charged off for depreciation, and that no definite showing appears of the actual operating expenses incurred or an itemized account of the betterments made from year to year. It is well settled that a deduction should be allowed for depreciation from age and use of the plant when determining the present value of tangible property for the purpose of testing the reasonableness of rates fixed by a municipal ordinance.

Knoxville vs. Knoxville Water Co., 212 U. S., 1.

As bearing upon a fair per cent to be deducted for depreciation, Mr. Drolet testified that 5 per cent was a reasonable per cent. And it is also well settled that a further deduction for franchise value should be made.

Lincoln Gas Co. vs. City of Lincoln, 182 Fed. Rep., 926, 928.

As already indicated no such reliable and definite information was presented to the court to enable it to reach a conclusion wholly satisfactory to itself of the value of the defendant company's property in March, 1911, but in the light of the evidence introduced upon the subject, as we analyze it, and applying the rules of law already stated, the value of said property at that time appears to be $89,460.78. This amount may not be mathematically correct, owing to the incomplete and unintelligible condition of the company's books in respect to the disbursements made and profits earned by it during the time mentioned as the same appeared in the evidence, and in this connection the evidence of the expert witness, J. Hope Sutor, who examined said books is not overlooked, but it is a result reached and verified

by an examination involving a careful analysis of such evidence.

The second proposition, as stated, is to ascertain, if possible, the total amount of the net profits the defendant company can earn under the rate fixed.

This is a matter of no little importance to the defendant company, because whatever its earnings may have been prior to the passage and taking effect of the ordinance of March 6, 1911, conditions may have intervened increasing or decreasing the facilities and cost for supplying gas by the said company.

The claim made that natural gas is distinguishable from other public utilities in that its quantity or quality is beyond human control, and that there is ever present an element of risk attending its production and distribution, is not questioned, nor is the correctness of the claim challenged that the quantity of natural gas may be affected by decreased rock pressure as well as by other varying conditions, all of which no doubt would tend to increase the cost of production. These elements of uncertainty appear to be peculiar to the business, including also the risk attending the development of gas territory and other risks, too, necessarily connected with the production and transmission of gas; but these risks are such as are assumed by the investor, a fact, however, which should not and cannot weigh in considering the question under discussion here. In this enumeration of risks it will be observed that the evidence given upon the subject refers to no one particular plant, but to the numerous plants of the Logan company, whose property interests are admittedly large.

Among other things, it is urged by the defendant company that the wells in the Knox-Licking field (designated herein as the local field) have become so depleted of late, thereby increasing the cost of production, that neither the Logan company nor any other company can furnish gas to the defendant company or the city of Newark and its citizens at the rate fixed by said ordinance with anything like

a reasonable net profit on the value of its plant. If this claim is borne out by the facts, then the equitable relief asked by the defendant company should be granted.

But what are the facts in this respect as disclosed by the evidence? Undoubtedly the wells in the local field have become more or less depleted owing to the causes described, but the evidence shows that said wells at the beginning of this litigation yielded more than four times the quantity of gas consumed by the city of Newark and its citizens. True it is shown that only 60 per cent of the gas delivered at the city of Newark was of the product of said wells, and the balance is from the West Virginia field. If this condition prevails, there must be some reason for it, but no reason appears to be given, nor does the record show the cost to said company of producing gas in the local field, although there was no little testimony introduced by the plaintiff bearing upon the cost of producing natural gas in territory adjacent to the local field as evidenced by the contracts for its sale and delivery to various cities in this State. Omitting figures, it is sufficient to say that such testimony appears to warrant the statement that the cost of producing gas and its sale at the prices therein named about the time of the passage of said ordinance do not indicate that the rate fixed therein is confiscatory in its effect.

Considerable testimony was offered upon the trial showing the price of gas delivered to various cities in this State as tending to show the general market price thereof delivered at the city of Newark. In the absence of any testimony tending to show the cost of producing and transporting gas to the city of Newark for distribution, such testimony would be entitled to no little weight, but what is the effect of such testimony as against proof of the cost of producing gas in the immediate vicinity of the local field, supplemented by proof that gas was being furnished at that time by said company at the 18-cent net rate? Situated as the city of Newark is, substantially contiguous to the local field, does not this fact, when considered in connection with

the admitted fact that the citizens of said city were supplied with gas by the same company for years prior to and up to the time of the passage of said ordinance at a rate not in excess of the rate fixed by said ordinance, minimize, if not nullify, the legal effect of any showing of the market value of gas at said city at said time? Assuredly different conditions may exist in other cities where possibly the price of gas may be governed by the volume of the supply, and other considerations may also enter into the price there charged for gas, but, as we view it, the real question made here is not what the prevailing price of gas at that time was elsewhere, but what was it reasonably worth when furnished to the citizens of Newark, in view of all the conditions here shown, and is the rate fixed by said ordinance such as to yield a fair return on the reasonable value of the company's property above all legitimate and proper charges?

As we read the record, the earnings of the defendant company during the year 1911 were such as to pay over 10 per cent net profit, and that in 1910 they yielded a much larger net profit. True the record covering these two years, standing alone, and in the absence of other evidence, might not be a safe criterion upon which to base a judgment of the net earnings of the company before that time, but the evidence shows that the total net earnings of this plant were very profitable from the time it was first organized, yielding to the management from 1902 to December 31, 1911, an average annual net profit of over 8 per cent, *during all of which said time said company charged the citizens of the city of Newark for gas the* 18*-cent net rate.* We do not feel called upon to pursue this inquiry further, feeling that the foregoing facts furnish their own comment, and while it is impossible to say with any degree of certainty what the net earnings of the company may be during the future five years' period, under said ordinance, it is reasonably safe to say that in view of the net earnings of the company during the period from 1902 to and including at least a portion of 1911, they

will be such as to avoid the charge of being confiscatory in their effect.

We now reach the third and final proposition. Will the amount of net profit be such as to yield a fair return on the value of this plant? It would seem that the conclusion reached as to the second proposition herein ought to be a sufficient answer to this inquiry, but we will notice some claims of counsel based upon said company's amended answer. Counsel for said company quote the following from the opinion of the court in the case of *New Memphis Gas Light Company vs. City of Memphis,* 72 Fed. Rep., 952-955:

> "The State is under an obligation to act justly, and without arbitrary discrimination between corporations of the State, just as it is between citizens of the State enjoying the equal rights. The State cannot, under the guise of a regulation, bring about a destruction and a confiscation of the company's property; and the State's power to absolutely abolish the corporation must be distinguished from its powers to destroy its business and confiscate its property so long as it chooses to permit its existence and to authorize its business by a valid charter. And the question of the reasonableness of the rate to charge is an elementary question for judicial investigation, requiring due process of law for its determination. And to deprive a company of the power of charging reasonable rates for the manufacture and sale of gas is to deprive it of the business of its property, and, in effect, of the property itself, without due process of law."

The foregoing embraces a concrete statement of the law. It tersely points out the constitutional guaranty afforded by the Fourteenth Amendment to the Constitution of the United States and incidentally touches the vital question raised in this case, wherein it is claimed that the defendant company is

denied the equal protection of the laws and without due process of law, in that said ordinance seeks to compel it to furnish gas for a period and at a price without adequate return without its consent.

It is to be remembered that the defendant company operated under another ordinance of the city of Newark in furnishing it and its inhabitants with gas and was so engaged at the time of the passage of the March 6, 1911, ordinance. Its relation to the public, therefore, then became fixed so far as being subject to public control.

In *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S., 79-84, Justice Brewer, delivering the opinion therein, quotes from *Munn vs. Illinois*, 94 U. S., 113, as follows:

> "Property does become clothed with a public interest when used in a manner to make it a public convenience and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that business and must submit to be controlled by the public for the common good to the extent of the interest thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

As already indicated, this power of control lodged in the city council, under the statute, should be exercised, not arbitrarily, but with an unbiased judgment and discretion, and such a rate fixed as will afford to the company a just compensation on the reasonable value of the plant at the time it was being used for the public—a rate that is just both to the company and to the public. "The idea of reasonableness is justice, and that which is unjust cannot be reasonable," says Justice Brewer, and it might here be remarked that courts have not been slow to safeguard property rights when the protection afforded by the Fourteenth Amendment to the

Constitution of the United States has been denied, nor on the other hand has the strong arm of the law been withheld from the public to protect it from imposition and wrong. With this record before us showing the net earnings of the company for the period named to be unusually large on what has been found to be the reasonable value of its plant, can the reasonableness of the rate fixed by said ordinance be successfully challenged as being obnoxious to or in contravention of the provisions of the said Fourteenth Amendment? The action of the city council being admittedly within the limits of legislative authority and its action being founded upon modes of procedure adopted for the government of municipal legislative bodies, such modes are to be regarded as due process of law. Having enacted this legislation, the will of the city council, speaking through this ordinance, becomes the law—the law unto this corporation and all persons affected by it—unless it should be made to appear that the constitutional provision safeguarding property rights has been disregarded. Here it is not claimed that there is any lack of uniformity in the operation of the said ordinance, or that there is any unjust corporate classification or discrimination made, but that it is here sought to take private property for public use without just compensation, in violation of the Fourteenth Amendment which forbids any State "to deny to any person within its jurisdiction the equal protection of the laws." That corporations are persons within the meaning of this constitutional provision is well settled, and in view of the repeated adjudications of the highest court in the land upholding this constitutional provision it has become generally recognized that "no duty rests more imperatively upon the courts than the enforcement of this constitutional provision intended to secure that equality of rights which is the foundation of free government." Observing this injunction upon courts, what is the duty of this court in view of the record before us? Can it be said that the rate fixed by said ordinance is confiscatory in its effect, or that it will be during the future five years period, in view of its net

earnings shown for the period named when the price charged by the defendant company was at the 18-cent net rate? Acting upon the well-settled principle that rates will not be declared confiscatory unless clearly shown to be so, a majority of the court are of the opinion that the rate fixed by said ordinance is not unreasonable or confiscatory in its effect, and we therefore hold that neither of the several defenses of the defendant company, which has the burden of proof, is sustained by the evidence.

But there is another feature of this case which should not be overlooked, in our judgment, and that is that said ordinance has not had the test of actual experience. There was no showing made by the defendant company of the practical effect of the rate fixed by said ordinance from the date of its passage to the date of the trial in this court, a period covering three years and more. In the absence of a showing made by the defendant company, *in a case permitting it,* that such rate will not yield a fair return on the reasonable value of its property employed, should not courts hesitate to interfere with rate legislation before being advised of the practical result of such rate?

In *Dillon on Municipal Corporations,* 1327, it is laid down that:

> "The judiciary ought not to annul or set aside rates established by legislative action unless they are proven or shown to be such as to make their enforcement equivalent to the taking of property for public use without such compensation as under all of the circumstances is just, both to the owner and to the public, that is, judicial interference should not occur unless the case presents clearly such a violation of the rights of property under the form of regulation as to satisfy the court that the rates prescribed will have the effect to deprive the company of reasonable compensation for its services."

In *Knoxville vs. Knoxville Water. Co., supra,* Justice Moody says:

> "The judiciary which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States."

Again, in *San Diego Land & Town Co. vs. National City, supra,* Justice Harlan, speaking for the court, says:

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of private property for public use without such compensation as under all the circumstances is just, both to the owner and to the public; that is, judicial interference should never occur, unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use."

Again, in *Wilcox et al vs. Consolidated Gas Company, supra,* Justice Peckham says:

> "But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation as based upon the value of the property found by the court below, and the defendant depends upon opinions as to value,

> which differ considerably among the witnesses, and also upon the results in future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made, if continuing business under that rate and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts."

From the foregoing it appears that the reasonable and safe rule for courts to follow is to decline to interfere by injunction with rate-making legislation before a fair test is made and shown of the practical effect of the rate fixed, to the end that courts may intelligently act upon evidence based upon the result of actual trial of such rate rather than speculation. As in the case of *Knoxville vs. Knoxville Water Company, supra*, so in this case, if it shall hereafter be made to appear under the actual operation of said ordinance that the returns allowed by it operate as a confiscation of property, the courts are open to afford a remedy.

The same decree may be entered herein as was entered in the court of common pleas. Exceptions.

Motion for new trial, if made, will be overruled. Exceptions.

Thirty days from this date will be allowed for a finding of facts and the statutory period allowed for filing a bill of exceptions.

Certified Copy of the Decision and Judgment of the Supreme Court of Ohio.

THE NEWARK NATURAL GAS AND FUEL COMPANY
vs.
THE CITY OF NEWARK, OHIO, BY FRANK A. BOLTON, *Solicitor.*

1. A transcript of verbatim stenographic notes of testimony in the Common Pleas Court may be adopted and used in the Court of Appeals by agreement of counsel, and if by proper attachment and reference made a part of the bill of exceptions will not be stricken from the record, but will be considered by this court.

2. Before a gas company may be relieved from compliance with the terms of an ordinance fixing the maximum price for gas, which has been regularly passed in pursuance of the authority conferred by section 3982, General Code, it must show that the rates so fixed are plainly unreasonable and will result in the taking of its property without just compensation.

3. In determining whether the price fixed by such ordinance will yield just compensation, it should be ascertained whether the amount of net profits from operation at the prescribed rate will produce a reasonable return upon the value of the plant of the company at the time of the inquiry.

4. The value of such property resting largely upon opinion evidence, the fact that the company prior to the passage of the ordinance in question had voluntarily reduced its rate to that thereafter fixed by such ordinance, and continued the same for several years, may be controlling and justify the conclusion that such rate is remunerative.

5. Where the company affected by such ordinance is a distributing company only, and procures the gas furnished under its franchise from a producing company upon a percentage basis of meter readings, and its contract therefor does not expire until two years subsequent to the passage of the ordinance fixing the maximum price to be charged for gas, the effect of such ordinance should be ascertained from conditions then existing, and in the absence of evidence to the contrary the court may properly assume that the price to the distributing company remains the same, and refuse to anticipate a condition that may obtain in the future, or speculate as to the future production of natural gas or the cost thereof to the producing company.

6. Where it is not clearly shown that a fixed rate for gas will be confiscatory, the company should be required to abide the test of actual experience under such rate, and when certainty rather than prophesy may be obtained present its case upon actual facts and conditions as they may then be shown to exist.

(No. 14787. Decided July 2, 1915.)

Error to the Court of Appeals of Licking County.

This proceeding originated in the Court of Common Pleas of Licking County, where, on April 25, 1911, a petition was filed by the City of Newark, through its solicitor, and a mandatory injunction sought against the Newark Natural Gas and Fuel Company to compel it to comply with the provisions of an ordinance of the city passed March 6, 1911, which ordinance fixed the maximum price the defendant company could charge the consumers of natural gas in said city for a period of five years at twenty cents per one thousand cubic feet of natural gas for fuel and light with ten per cent discount on all bills paid before the tenth of the succeeding month. Said company had refused to accept

the provisions of said ordinance or abide by the terms it specified, and had notified its consumers in said city that it would not accept the price so fixed, and that unless the price of twenty-five cents was paid service would be discontinued.

Said company furnishes natural gas for fuel and light to the inhabitants of said city of Newark under favor of a franchise granted by said city, through its council, February 21, 1898, and ever since the passage and acceptance of said ordinance said company has continued to supply gas to said city and its inhabitants.

By its answer said company admits the passage of said ordinance of March 6, 1911, in due form, but avers that it is unreasonable in its terms, and deprives said company of adequate profit and operates as a fraud upon the property rights of said company; that it is contrary to and in violation of section 1, article I, of the Bill of Rights of the Constitution of Ohio; also of section 19, article I, of the Constitution of the State, for the reason that it is the taking of private property without due process of law, in that said ordinance attempts to compel said company to furnish gas at a price without just compensation of profit. It charges further that said ordinance is contrary to and in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to said company the equal protection of the law by compelling it to furnish gas for a period, and at a price, without adequate return, compensation, or profit.

In the Court of Common Pleas a judgment and decree was entered in favor of the city, and on appeal the Court of Appeals entered the same decree as did the court below, and from this judgment and decree error is now prosecuted in this court.

Mr. Eugene Mackey, Mr. S. M. Douglass, and *Messrs. Fitzgibbon, Montgomery & Black* for plaintiff in error.

Mr. Ralph Norpell, solicitor, for defendant in error.

MATTHIAS, *J.*:

The defendant in error seeks to have stricken from the printed record all of the so-called "Exhibit AA," excepting exhibits thereto attached upon the claim that the same is not a part of the bill of exceptions taken in the Court of Appeals and filed in this court. The matter which defendant in error contends is not properly a part of the record, and, therefore, should not be considered by the court, embraces all the evidence offered by the plaintiff in error in the hearing of this case in the Court of Common Pleas. The record shows that defendant in error introduced and read in evidence all the evidence given in its behalf on the trial in the Court of Common Pleas, and that the plaintiff in error then offered and read in evidence all the evidence offered by it in the trial in the Court of Common Pleas, and then follows the statement: "A full and complete transcript of verbatim stenographic notes of said testimony and evidence given on the trial in the Court of Common Pleas is hereto attached, marked "AA" and made a part hereof." In this manner all the evidence given in the lower court is brought into the record in the Court of Appeals, and by attachment and reference, as above indicated, was made a part of the bill of exceptions by the judges of that court. The record before us shows that counsel for plaintiff in error sought, and was allowed by the Court of Appeals, to reserve exceptions to the exclusion of certain evidence sought to be introduced in the Court of Common Pleas. It thus appears that probably for the purpose of convenience and economy of time the evidence was placed before the Court of Appeals in such manner. No objection to this practice is disclosed by the record, and we conclude that only in the instance above stated was exception noted in the Court of Appeals to the ruling of the court upon the introduction of evidence, and that otherwise the record, as made in the Common Pleas Court, was submitted to and received by the Court of Appeals in lieu of again calling the witnesses. Under such

circumstances this court will consider the evidence thus brought into the record, although in accordance with the decision of *Dunn vs. State,* 23 Ohio St., 167, statements in such exhibit purporting to recite rulings of the trial court admitting or excluding evidence, cannot be considered.

The ordinance of the city of Newark, the validity of which is questioned, was passed by virtue of the power conferred by section 3982 of the General Code, which authorizes the council of a municipality, "to regulate from time to time the price which such companies may charge, * * * for gas for lighting or heating purposes;" and further provides that such companies shall in no event charge more than the price specified by the ordinance of council. It is admitted that said ordinance was passed in due form by the council of the city of Newark, and the only issue presented arises from the contention of the plaintiff in error that the rate prescribed by such ordinance is unreasonable and if enforced will result in confiscation of its property.

The Newark Natural Gas and Fuel Company was organized in 1889 and in 1898 was granted a twenty-five-year franchise by said city. For several years it was both a producing and distributing company, but for the past ten or twelve years it has been a distributing company only, and since 1904 has procured its supply of gas from the Logan Natural Gas and Fuel Company on a percentage basis under a contract between said companies which expired March 1, 1913. Although the previous ordinance permitted a net rate of twenty-five cents, the eighteen-cent rate was voluntarily adopted by the plaintiff in error some time prior to the adoption of the ordinance now in question. Plaintiff in error now contends that such reduction was made because of the development of a near-by field, greatly augmenting the supply of gas, and that it is now materially reduced.

It is argued by the plaintiff in error that this case differs greatly from many of the adjudicated cases of this character, by reason of the fact that two companies are neces-

strily affected by the rate, the producing company and the distributing company, and that in the determination of the fairness and reasonableness of the prescribed rate it becomes necessary to consider, not only the cost of procuring and distributing gas, but also the cost of its production.

However, the facts and the conditions which may properly be considered, as well as the test to be applied thereto by the courts for the purpose of determining every question in controversy in this action, are well settled and have been clearly and concisely announced in what must be regarded as leading cases of the class to which this proceeding belongs. We direct particular attention to the decision of the Supreme Court of the United States in the case of the *City of Knoxville vs. Knoxville Water Company,* 212 U. S., 1, and *Willcox vs. Consolidated Gas Co.,* 212 U. S., 19. In the former case it is held that, "Rate-making is a legislative function, whether exercised by the legislature or by a subordinate body to which power has been delegated, such as a municipality. While courts may refuse to enforce legislation on constitutional ground, the power should only be exercised in the clearest cases."

This action of the city having been taken pursuant to legislative authority, is a proper exercise of legislative power, and, therefore, the company assailing the rates fixed in such manner must show that their enforcement will result in the taking of its property without just compensation. *Cedar Rapids Co. vs. Cedar Rapids,* 118 Iowa, 234; 120 N. W., 966.

In *Willcox vs. Consolidated Gas Co., supra,* the rule to be applied in cases of this character for the purpose of ascertaining whether a prescribed rate is unreasonable, is concisely stated. It is there held that, "Rates when fixed by legislative authority, for public-service corporations, should allow a fair return upon the reasonable value of the property at the time it is being used, but the legislative act will not be declared invalid by the courts unless the rates are so

unreasonably low that their enforcement would amount to taking property for public use without compensation."

Upon the hearing in the Court of Appeals a very large volume of evidence was introduced tending to show the value of the plant of the Newark Gas Company and the net profits that would be realized under existing conditions at the price fixed. From these factors it was ascertained that the net profits were sufficient to provide the company a fair and just return upon the value of its property. It would not be profitable here to review in detail the large volume of data presented or discuss the various opinions of the several experts who testified upon the trial of the case. Our only duty is to ascertain whether the conclusion reached by the Court of Appeals is the correct one. From the record before us it is apparent that if computation be based upon the highest valuation of the complaining company's plant fixed by any witness, a net profit of ten per cent would be realized by the company. On the valuation of another witness called by plaintiff in error the rate now complained of yielded in 1911 a net profit of approximately seventeen per cent. In some of these estimates elements were included which should not enter into the calculation. For instance one expert upon whose evidence plaintiff in error placed great reliance, and apparently a man of skill and experience in his profession, based his estimate of the value of said plant on the cost of building a competing plant on the same streets and included an item of $33,379 for "pavement over mains," notwithstanding the record shows that there was no street paving over the mains when the pipes were originally laid. We refer to this instance as illustrative merely and to show the care that must be exercised in following the estimates of the valuation of property of such character.

When property is devoted to a use in which the public has an interest the public is thereby granted an interest in such business and it is subject to control for the common good. Such company is entitled, therefore, only to a fair return on the value of that which is employed for the pub-

lic convenience. *Munn vs. Illinois,* 94 U. S., 113; *San Diego Land & Town Co. vs. National City,* 174 U. S., 739; and it should be based upon the reasonable value of the property at the time it is being used by the public. *Willcox vs. Consolidated Gas Co., supra.*

In the calculations above referred to no deduction was made for depreciation of the plant and the evidence shows that five per cent a year would be a fair estimate for that item. When the value of property of such character rests so largely upon opinion evidence, the fact that the company prior to the passage of the ordinance in question had voluntarily reduced its rate to that specified in the ordinance thereafter passed, and maintained the same for several years immediately preceding the passage of such ordinance, may be controlling and fully justify the conclusion that such rate is remunerative.

It may be fairly assumed that rates voluntarily made by the company return not only a fair but adequate compensation, especially in the absence of evidence showing any actual increase of expense or cost of furnishing gas to the Newark patrons. No evidence was offered showing what the Newark Company pays the Logan Company for gas subsequent to March 1, 1913, although the opportunity was afforded the Newark Company to produce such evidence as late as September 26, 1914. The court should not be asked to indulge in mere speculation and arrive at a conclusion based only upon various and varying opinions of experts, which opinions are apparently based upon conditions which are themselves admittedly varying and uncertain. The records of the company showing its net earnings subsequent to 1911 should have been disclosed and all information available placed before the court that would tend to show that the rate fixed is unreasonable. Sufficient time had elapsed to enable the company to place before the court actual facts showing the effect of operation on its plant and the furnishing of gas upon the terms prescribed by this ordinance. The burden is upon the company to show the court that the price fixed is

unreasonable, not merely that there is a possibility or probability that it will become so. If there was a change in the price required by the producing company, such evidence should be in the record. Evidence of conditions, not only when the ordinance was passed, but subsequent thereto, was admissible and would have been most helpful to the court in solving the problem presented in a controversy of this character. *City of Knoxville vs. Knoxville Water Co., supra.*

We find in the record no possible basis for the claim that the rate fixed by this ordinance does not yield a fair and just compensation to the plaintiff in error under the conditions obtaining in 1911. The following cases deal instructively with the question of what is adequate compensation: *Lincoln Gas & E. L. Co. vs. Lincoln,* 182 Fed., 926; *Willcox vs. Consolidated Gas Co., supra,* and *Cedar Rapids Gas & Light Co. vs. Cedar Rapids, supra.*

However, it is urged by plaintiff in error that in view of the fact that it is now a distributing company only and procures its supply of gas of a producing company, and that its contract with such company for gas delivered to its lines upon a percentage basis of meter readings would expire two years after the passage of said ordinance and three years before the end of the period covered thereby, a proper rate cannot be ascertained without inquiry and determination of the cost of producing gas and transporting it to the lines of the plaintiff in error. Upon this theory much evidence was adduced tending to show that the Logan Company, with which the plaintiff in error has a contract for its supply of gas, for various reasons, cannot furnish its product in the future on the terms of its former contract, and included evidence of the value of the plant of the Logan Company, and computations to ascertain what rate would insure it a fair compensation for its share of the service rendered.

An excursion into a vast field thus invited may have been justified under some circumstances, but surely not under the conditions disclosed by this record. In the absence of evidence to the contrary the court was justified in assuming

that the contract price for gas remained the same and need not anticipate a condition which might or might not obtain in the future.

Dillon in his work on Municipal Corporations, section 1327, thus states the rule that should guide judicial review of rate-making legislation: "The judiciary ought not to annul or set aside rates established by legislative action unless they are proven or shown to be such as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just, both to the owner and to the public, that is, judicial interference should not occur unless the case presents clearly such a violation of the rights of property under the form of regulation as to satisfy the court that the rates prescribed will have the effect to deprive the company of reasonable compensation for its services."

The evidence disclosed in the record does not show that the rates fixed by this ordinance will result in a violation of the rights of property of the plaintiff in error, or that it will have the effect to deprive it of reasonable compensation for its services, and therefore fails to establish a present right of plaintiff in error to exemption from compliance with the terms of said ordinance. Said company will, therefore, be required to abide the test of actual experience under the rate fixed by this ordinance, and when certainty rather than prophecy may be obtained it will have the right to present its case upon actual facts and conditions as they may then be shown to exist.

It follows that the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Johnson, Donahue, Wanamaker, Newman, and Jones, JJ., concur.

COLUMBUS, O., July 22, 1915.

I hereby certify that the foregoing is a true and correct copy of the opinion in case No. 14787, The Newark Natural Gas and Fuel Co. *vs.* The City of Newark, Ohio, by Frank A. Bolton, solicitor, as the same is on file in this office; but the same is subject to revision and addition by the judges until published in the official reports.

E. O. RANDALL,
Reporter of the Supreme Court.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 7/22/15. E. O. R.]

STATE OF OHIO,
Licking County, ss:

Charles C. Cooper says that he is the official stenographer of the Common Pleas Court and the Court of Appeals of Licking County, Ohio, and that the decision of the Court of Common Pleas, Court of Appeals, summary of the evidence of Samuel S. Wyer, testimony of R. S. Lord, contract between The Logan Natural Gas and Fuel Company and The Newark Natural Gas and Fuel Company, the investment and earnings chart of The Newark Natural Gas and Fuel Company are true and correct copies of the original decisions of said courts, and true and correct copies of said summary statement of Samuel S. Wyer, the testimony of R. S. Lord, the contract between The Newark Natural Gas and Fuel Company and The Logan Natural Gas and Fuel Company and the chart of earnings and investment of The Newark Natural Gas and Fuel Company as the same were taken and now appear in the transcript of the evidence taken at the trials of said case in said courts.

In testimony whereof I have hereunto set my hand this 12th day of January, A. D. 1916.

CHARLES C. COOPER,
Official Court Stenographer of the Court of Common Pleas and Court of Appeals of Licking County, Ohio.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/12/16. C. C. C.]

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IN THE

Supreme Court of the United States

October Term 1916.

No. 232.

THE NEWARK NATURAL GAS AND FUEL COMPANY,
Plaintiff in Error.

vs.

THE CITY OF NEWARK, OHIO,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

For clearness and brevity in this brief, the plaintiff in error, The Newark Natural Gas & Fuel Company, will be designated the "Company" and the defendant in error, The City of Newark, Ohio, will be designated the "City."

It is the desire of the defendant in error to supplement and extend the "Statement of Facts" appearing in the "Motion to dismiss or affirm or transfer to the Summary Docket," filed herein.

This case arose by reason of City Council of the city of Newark, passing a rate ordinance in March, 1911, by the terms of which it required the Company to furnish natural gas to the citizens of Newark at a rate of twenty cents per thousand cubic feet, with a discount of ten per cent if gas bills were paid before the 10th day of each month; said rates were fixed for a period of five years from the date of the passage and taking effect of the ordinance. The Company refused to abide by the terms of said ordinance. Thereupon and within a month thereafter, the Company published notices in the newspapers of the city to the effect that, beginning with the May, 1911, collection of gas bills, it would refuse to furnish gas to any of citizens who refused to pay for it at the rate of twenty-five cents per thousand cubic feet, with a discount of ten per cent to those who would pay before the tenth of the succeeding month.

Immediately upon the passage and taking effect of said ordinance it became the duty of the Company either to conform its business to the terms prescribed in the ordinance or, if it thought such rates were so low as to be unreasonable and confiscatory, after a fair trial of said rates, to apply to the courts for relief.

The Company chose to do neither, but, without taking steps to obtain legal relief, proceeded to take the law into its own hands and ignore the ordinance fixing the rate. This forced the city to take steps to enforce the ordinance, and the council of the city of Nework authorized the Solicitor of said city to bring this suit to compel the Company to submit to the rate fixed by the ordinance.

The petition, page 4 of the Record, sets forth the franchise ordinance of February 21, 1898, under the

terms of which the Company was granted the right to use the streets and other public places to supply natural gas to the city and its citizens, and the acceptance of this ordinance; the petition further sets forth the rate fixing ordinance of March 6, 1911; it avers the notices above mentioned, given by the Company to the gas consumers in the city, and the refusal of the Company to furnish gas at the rate fixed, and prays for an injunction restraining the Company from collecting more than the rate fixed by said ordinance of March 6, 1911, and that said Company be compelled to comply with the terms thereof.

The twenty-five year franchise ordinance granted to the Company and the acceptance thereof are found on pages 6 to 9 of the record. The ordinance of 1911, fixing the rate is found on pages 9 and 10 of the Record.

The amended answer of the Company, pages 10 to 11 of the Record, contains four defenses, and practically admits all the allegations of the petition, but alleges that the price fixed by the ordinance of 1911 is unreasonable and denies to the Company adequate profit; the second defense alleges that said ordinance fixing said rate is in conflict with Section one, Article 1, of the Bill of Rights of Ohio; the third defense alleges that said ordinance is in violation of Section 19, Article 1, of the Bill of Rights of Ohio; and the fourth defense alleges that the ordinance is in violation of Section 1, Article 14, of the Constitution of the United States.

In the trial of this case in the Court of Common Pleas, the Court of Appeals, and the Supreme Court of Ohio, judgments were rendered in favor of the City.

All the courts found that the city had the right to fix rates, the rate fixed was reasonable, and that none of the constitutional rights of the Company were violated.

The assignment of error filed herein submits that there is error in the judgment of the Supreme Court of Ohio, and that the same violates the provisions of the First section of the Fourteenth Amendment to the Constitution of the United States; that it violates the 5th Amendment to the Constitution of the United States; that it violates Article 1, Section 10 of Clause 1, of the Constitution of the United States; that the Company was deprived of rights, privileges and immunities secured by other citizens of the United States, and the State of Ohio; that the Company is deprived of its property without due process of law; that its property was taken without just compensation.

THE CONSTITUTIONAL QUESTION.

The assignments of error herein attacking the judgment of the Supreme Court of Ohio presents for the first time in the history of this case the claim that said judgment violates the 5th Amendment to the Constiution of the United States and that it violates Article 1, Section 10 of Clause 1 of the Constitution of the United States. The only federal question raised by the pleadings and by the petition in error from the Court of Appeals to the Supreme Court of Ohio was that the ordinance violated Section 1 of the Fourteenth Amendment to the Constitution of the United States. The claim of the Company in its broadest extension is that the rate ordinance passed by the city is unconstitutional in that it

violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, that it deprives the Company of its property without due process of law and denies to it the equal protection of the laws, in that under the rate fixed, it cannot earn a fair profit, and is by reason thereof, confiscatory. All the factors necessary to be considered in arriving at a conclusion as to the constitutionality or unconstitutionality of the rate fixed have been passed upon by this court.

In determining whether the rate in question constitutes a fair compensation for the use of the property of the Company, the reasonable value of such property necessarily used in its gas business at the time of the inquiry is to be taken as the foundation of the calculation.

Smyth vs. Ames, 169 U. S. 546.

Stanislaus County v. San Joaquin & K. River Canal & Irrigation Co. 192 U. S. 201, 216, 48 L. Ed. 406, 414, 24 Supreme Ct. Rep. 241.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, Sup. Ct. Rep. 804.

Freeport Water Co. vs. Freeport, 180 U. S. 600, 45 L. ed. 689, Sup. Ct. Rep. 493.

Spring Valley Waterworks v. San Francisco, 124 Fed. 586.

Chicago Union Traction R. Co. v. Chicago, 199 Ills. 579, 65 N. E. 470.

Souther v. Gloucester, 187 Mass. 555, 69 L. R. A. 309, 73 N. E. 558.

Kennebec Water Dist. v. Waterville, 97 Me. 293, 60 L. R. A. 856, 54 Atl. 6.

Knoxville v. Knoxville Water Co., 212 U. S. 9, 10, 53 L. ed. 378, 379, 29 Sup. Ct. Rep. 148.

Wilcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 An. Cas. 1034.

Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed. 926.

San Joaquin & K. River & Irrig. Co. v. Stanislaus County, 191 Fed. 875.
Des Moines Gas Company v. Des. Moines, 238, U. S. 153.

The burden being upon the Company to establish every fact necessary to a finding that the rate fixed, if put in operation, would result in confiscation, before the court would be justified in holding the ordinance in question invalid because confiscatory and in violation of the constitution, and the proof of that fact must be clear, convincing and satisfactory.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.
San Diego Land & Town Co. vs. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.
Wilcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. ed. 382, 395, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192.
Des. Moines Gas Co. v. Des Moines, 238 U. S. 153.

The rate or price fixed by the city council that may be charged for public service is presumed to be reasonable, and the court is limited in its inquiry in passing upon a rate thus fixed to the question as to whether or not the rate is confiscatory.

Cedar Rapids Water Co. v. Cedar Rapids, 144 Iowa 260, 91 N. W. 1081;
Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299; 120 N. W. 968:
San Diego Land & Town Co. v. Jasper, 189 U. S. 441, 47 L. ed. 894, 23 Sup. Ct. Rep. 571;
Cumberland Telep. & Teleg. Co. v. Louisville, 187 Fed. 641;
San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804;

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418;
Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 216, 48 L. ed. 406, 414, 24 Sup. Ct. Rep. 241;
San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L. R. A. 460, 62 Am. St. Rep. 297, 50 Pac. 633;
Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148;
Wilcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Ca. 1034;
Railroad Com. v. Cumberland Telep. & Telg. Co., 212 U. S. 414, 53 L. ed. 577; 29 Sup. Ct. Rep. 357;
Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed 926;
Simpson v. Shepard, 230 U. S. 352;
Des Moines Gas Co.. v. Des Moines, 238 U. S. 153.

Even if it should be found that the ordinance in question fixes the rate so low that it will return to the Company only the lowest current rate of interest, the rate should not be held unreasonable and confiscatory.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L. R. A. 460, 62 Am. St. Rep. 261, 50 Pac. 633;
People v. Budd, 117 N. Y. 125, 5 L. R. A. 559, 15 Am. St. Rep. 460; 22 N. E. 670;
Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087;
Covington and L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 591-595, 41 L. ed. 560, 564-566, 17 Sup. Ct. Rep. 198;
Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74;
Shepard v. Northern P. R. Co., 184 Fed. 765;
St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220;
Louisville & N. R. Co. v. Siler, 186 Fed. 176;
Knoxville v. Knoxville Water Co., 212 U. S. 9;
Wilcox v. Consolidated Gas Co., 212 U. S. 19;

Des Moines Gas Co. v. Des Moines, 238 U. S. 153;
Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed. 926;
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 144 Iowa 426, 120 N. W. 968; 138 Am. St. Rep. 299; 48 L. R. A. (N. S.) 1025;
Spring Valley Waterworks v. San Francisco, 124 Fed. 586.

A deduction for depreciation from age and use must be made from the estimated cost of reproducing a gas plant when determining the present value of the tangible property for the purpose of testing the reasonableness of the rates fixed by a municipal ordinance.

Knoxville v. Knoxville Water Co. 212 U. S. 1;
Wilcox v. Consolidated Gas Co., 212 U. S. 19;
Cedar Rapids Gas Light Co. v. Cedar Rapids, 120 N. W. 968;
Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed. 926;
Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 641;
Simpson v. Shepard, 230 U. S. 352.

It is manifest, from the above authorities, that authority to regulate the rates of a public service corporation in justice to the public on the one hand, and without injustice to the corporation on the other hand, is fully sustained, and, is therefore, no violation of Sec. 1, Article 14 of the Constitution of the United States or any other provision of said constiutiton. It would appear from the foregoing that when any case of this kind comes before any court, the function of the court would be to determine two, or at best, but three factors. First, what is the value of the plant of the corporation? Second, what is the total amount of the net profits it could earn under the rate fixed? Third, whether the said amonut of net profits is sufficient to provide a fair return on the value of the plant. These three factors, therefore, must control this case, and of them in their order:

THE VALUE OF THE PLANT.

Many different theories were advanced by the Company to determine the value of its property. It is a well settled rule of law that the company is entitled to a fair return upon the value of the property at the time of the inquiry. Following this rule and attempting to find the reasonable value of the property by the aid of the light shed upon that question by the testimony in the case we find ourselves led into the fields of theory, speculation and fancy.

(a) The first valuation to which the court's attention is directed is the valuation placed upon the property by T. N. Barnsdall. Mr. Barnsdall fixes the valuation at five or six hundred thousand dollars. R. 328. Mr. Barnsdall, as the testimony discloses is president of The Union Natural Gas Corporation which is one of the largest stockholders of the plaintiff in error. Mr. Barnsdall's estimate is nothing more nor less than an off-hand guess without any proper or legal foundation for the same in facts. The testimony disclosed that he had absolutely no knowledge of the plant, did not know how many miles of pipe there were in the city, howmany consumers the company had, or what the receipts of the company were, in fact he had no legal, legitimate, or even sensible predicate for his conclusions. R. 328 and 329.

(b) The next valuation to which the attention of the court is directed is the tax valuation. As disclosed by the record these valuations varied from $47,114 in 1909 to $435,670 in 1912. R. 220 and 225. The amount of betterments added to the plant during those years was less than

$10,000.00 as disclosed by "Exhibit S" of the Record. No evidence was introduced by the Company from the person or persons making such valuation, or the manner in which the same was made. It is simply the conclusion of the Tax Commission and the record is silent as to the manner in which it was arrived at and the elements considered in fixing the same. This court has held that it would not consider this method of valuation.

> "The assessed value for taxation furnishes no criterion by which to ascertain their values where the taxes are treated by the company as part of its operating expenses to be paid out of its earnings before the net amount applicable to dividends can be ascertained."
>
> Wilcox vs. Gas Co., 212 U. S. 61.

That the taxes of this company are made a part of the operating expenses of the company see R-45, and Exhibit CCC at page 63.

(c) The next testimony introduced on the subject of the valuation of the company's property was that of R. S. Lord. Mr. Lord, although not an engineer claims to have had extensive experience in constructing gas systems, R. 213, and places the value of the physical property on a reproduction basis at $309,000. R. 214. He made no investigation of the books of the company to ascertain the cost of material, and made no allowance for depreciation. R. 217.

(d) S. S. Wyer, testifying on behalf of the Company, places the fair value of the plant for rate making at $432,208. R. 57. Item 12 in Mr. Wyer's "Plant reproduction Cost Summary," R. 56 and 57, which is an attempt to capitalize the pavements over mains" and which amounts to $33,379.00, R. 56, is expressly excluded

from consideration by the action of this court in the case of The Des Moines Gas Co. vs. City of Des Moines, 238 U. S. 153. There was no paving over mains when this plant was constructed, R. 48, 49, 50. We desire to call the courts attention to the difference in the reproduction cost of the physical property by Mr. Lord, which was $309,000, R. 214, and that of Mr. Wyer which is $356,708, R. 56, a difference of $47,708. Further, this witness makes an allowance of $71,342, R. 56, for "promotion, legal, organization, superintendency, contingent, interest during construction which is 20% of the physical valuation as determined by him. It is our contention that this item is merged into and became a part of the cost of the plant on its sale in 1898. The stock of this company was sold in 1898 for $101,560, R. 359 and 360, and at that time it was a real, live, working plant, all expenses "for promotion, legal, organization, superintendency, contingent, interest during construction" had been incurred. The price for which it was sold was probably the best that could have been obtained for it at that time. The plant had been in operation at that time some ten years, so that it is fair to assume that the price paid was not only its physical value but that all the necessary elements to be considered in arriving at its fair value, were included.

An inventory of the plant was taken in 1902, and this inventory discloses the fact that the value of the physical property at that time amounted to $122,638.96, Exhibit BBB, R. 62. To this physical property there has been added up to and including the year 1911, the sum of $82,445.39, which including the Thurston line, a part of which is not being used, would make the value of the

physical property without any depreciation the sum of $242,340.02. To this amount the company in 1902 added $60,000, Exhibit BBB, R. 62, for intangible values. To quote their witness, "Well, we took it to represent a good many things; the franchise value; the organization cost; interest and taxes during construction; working capital; rights of way; damages during construction. "Yes, sir, the intangible value of the property as close as we could estimate it" R. 309 and 310. So that the company itself placed its own value on all of the intangible elements of the plant, and that value was carried by the company on its books from that time until the present. The only re angible, and satisfactory evidence offered concernir aluation of the plant is the evidence of the sa 1898, of $101,560, and the inventory of 1 8.96. Adding to these figures the better a year to year, we arrive at the figures whic epresent the actual cost of the plant to the investors. Deducting the depreciation for deterioration of the physical parts and adding a sum for a plant in successful operation, we arrive at the fair value of the plant for rate making purposes. So that this $60,000 added to the "bare bones" of the plant represents the estimate of the company of not only promotion & etc., for which Mr. Wyer allowed $71,342, R. 56, but also, the cost of the developing business, for which he made an extra allowance of $72,440. R. 57. Deducting the amount claimed for "paving over mains" $33,379, R. 56, from the physical valuation fixed by Mr. Wyer, $356,708, R. 56, we have his reproduction value of the physical property corrected, and it amounts to $323,329. Substituting the amount of the intangible values claimed by the

company and deducting from the total 20% for depreciation, and the value of the property appears to be $306,664. Or, using Mr. Lord's figures as to the valuation of the physical property, $309,000 and adding thereto $60,000.00 for intangible values and deducting 20% for depreciation and we have the value of the property , $285,200.

Again, Mr. Wyer, in determining the value of the plant of the Company for rate making, made two separate allowances for intangible values over and above the tangible values of the property. He made an allowance of $71,342, R. 56, for "Promotion, legal, organization, superintendency, contingent, interest during construction, and taxes during construction." In addition thereto he made an allowance of $72,768, R. 57, for "Cost of developing business in acquiring 6,484 service connections," or the present going value of the plant in excess of the "bare bones of the plant," and representing the difference between a "dead plant and a live one," is estimated at 17% of the reproduction cost of the plant—17% of $428,050. According to the ruling of this court in the Des Moines case 1st Syl.:

> "The going value of a long established and successful gas company was sufficiently taken into account in determining the value of the company's property for the purpose of testing the reasonableness of gas rates fixed by municipal ordinance, where the valuation was based upon a plant in actual and successful operation, and overhead charges were allowed for promotion, organization and development expenses."

The allowance of 15% for "overhead charges" by Mr. Wyer is large enough to take care of all the intang-

ible elements connected with the plant, and necessarily assumes the actual and successful operation of the plant, as the business of this company has been long established and profitable from the very first.

As was said by the court in the Des Moines case:

> "As pointed out in the Cedar Rapids case, if return is to be regarded beyond that compensation which a public service corporation is entitled to earn upon the fair value of its property, the right to regulate is of no moment, and the income to which the corporation is entitled would become the basis of valuation in determining the rights of the public. When, as here, a long established and successful plant is valued for rate making purposes, and the value of the property fixed as the master certifies upon the basis of a plant in successful operation, and overhead charges have been allowed for the items and in the sums already stated, it cannot be said in view of the facts in this case that the element of going value has not been given the consideration it deserves, and the appellants contention in this behalf is not sustained."

The additional allowance of 17% for business development constitutes and is a further charge for the same thing. All the items of "promotion, legal, organization, superintendency, contingent, interest during construction, and taxes during construction," have been charged to operating expenses and deducted from gross receipts before arriving at net profits. The Company has been compensated for all the expenditures so made and to make these items part and parcel of the Company's plant when it has had the money returned to it in years of fat profits seems to us to be an absurd proposition. What the money spent for these items was properly charged to operating

expenses and to capitalize this money so paid and so returned, is much akin to the watering process which has become quite a fad in recent years. It in effect capitalizes the money which has long since jingled in the pockets of the Company. The same reasoning applies with equal force to the allowance of the additional 17%. In the first place the physical valuation takes care of the entire tangible property including connections and the cost of installing them, and in the second place the allowance of the 15% overhead charges takes care of all the intangible elements to the point of doing business. Natural gas is unlike other public service activities in that the business growth is not a matter of years, the public does not have to be educated, advertisement is unnecessary, and the demand for it is only limited by the size of the community to be supplied. The allowance of the 15% starts the plant, not a theoretical plant, but the plant of the Company in its entirety, and any further allowance for the development of business evidences either a lack of knowledge on the part of the engineer of this particular kind of public service, or an over zealous desire to serve the company in whose behalf he was testifying. Given a completed natural gas plant with all its connections, the number of consumers would only be limited by the number of connections, and the price charged.

The method employed by the engineer in arriving at depreciation is open to criticism, and on the face of it, the amount fixed can be nothing more nor less than the wildest sort of guess, colored as it is by the employment of the witness by the Company. The statement of the witness that no opportunity was had to go into the early

history of the company—knowledge of the plant gained solely from an inspection of some of the lines for electolysis some years previous—an inspection of some meters and a checking of a part of the stock on hand, constitutes the basis of the engineer, not only for his valuation of the plant, but also for his estimate of the depreciation of the same. A list of the material and property was furnished to the engineer and from this list his opinion was predicated. How could any sensible or rational conclusion be reached with reference to depreciation without a knowledge of the previous history of the plant? The number of years the plant has been in operation the character and quality of material used, the soil in which the pipe is placed together with its age, are necessarily the only proper predicates for any estimate of depreciation. The vice of the finding of the engineer as to the depreciation, has the same general characteristics as that disapproved by this court in the case of Simpson v. Shepard, 230, U. S. 332, the court saying, pages 763, 764:

> "If there are items entering into the estimate of cost which should be credited with appreciation, this also should appear, so that instead of a broad comparison there should be specific findings showing the items which enter into the physical valuation on both sides."

again, the 8th syl. of the same case:

> "The physical valuation of the property of a railway company on the basis of the cost of reproduction now for the purpose of testing the reasonableness of state regulation of its rates is incomplete where depreciation is found in general terms to be more than offset by appreciation, without showing the specific items of such appreciation and depreciation."

The finding of the engineer as appears in his summary statement at page 56 of the record, "Present value of the plant, allowing for appreciation, also for shrinkage due to depreciation, is estimated at 80% of the reproduction cost now," is afflicted with the same infirmities as the finding in the case cited. Whilst the engineer in this case made an allowance of 20% for depreciation, appreciation and depreciation were not found as to the specific items involved.

An allowance was made by Mr. Wyer of $15,000, R. 57, for working capital. The average monthly receipts in 1911 were $19,575.58. The average monthly operating expenses were $2,273.45. The average monthly amount paid for gas in same year was $13,702.90, and the total average net monthly profit is $3,599.23. The attention of the court is directed to the operating expenses of said companies in previous years, and it will be seen that they vary but little. A working capital in excess of the average requirement per month as shown by years of operation would be absolutely unnecessary and that amount should not exceed $2,500.

(e) What the court is most concerned about is the real value of this property. Without the books of the company to go by, the theoretical valuations placed upon the property should receive no little consideration, but when the books furnish not only the actual cost of the property but in addition therto its actual value to the company, evidence that is purely a product of the imagination becomes valueless. For that reason we contend that the value placed upon the property by the company itself is entitled to greater weight than any other evidence offered on this proposition. These figures,

$302,889.02, "Exhibit S," represent actual cost plus all intangible values without any allowance for depreciation In accepting these figures as they appear, no harm nor injustice can be claimed by this Company for they represent actual cost plus $60,000 for intangible values and upon that valuation in the year 1911, the company earn 14.2% profit. The investment figures herein correspond so nearly to the figures obtained by the calculations made hereinabove in item (D) that the conclusion is almost irresistible that this property cannot be worth more than $300,000. As before stated the valuations of the physical property of both Mr. Wyer and Mr. Lord were made upon a reproduction basis. Applying the rule laid down in the case of the City of Knoxville vs. Knoxville Water Co., 212 U. S. 1:

> "A deduction for depreciation from age and use must be made from the estimated cost of reproducing a waterworks plant when determining the present value of the tangible property for the purpose of testing the reasonableness of the rates fixed by a municipal ordinance."

Now, the matter of depreciation becomes very important, especially where the reproduction basis is used. According to Drolet, auditor of the company, the depreciation of the physical property would amount to 5% a year, R. 300. According to Wyer, R. 100, depreciation amounted to only 20%, R. 56, although the plant had been in operation for a period of twenty-five years. Both estimates are undoubtedly wide of the mark. The estimate of the valuation of Mr. Wyer with the exception of a part of the stock on hand and a few other items was made from an inventory of the property furnished to

him by the company and was not made from a personal inspection of the lines, connections and meters, R. 32, and for that reason is not entitled to much consideration. Valuations placed upon property after such an examination as this, would necessarily lead the court to doubt and uncertainty and would be anything but a satisfactory predicate for its judgment. The great difference in the cost of labor in installing medium, low and high pressure gas mains as testified to by Mr. Christian, director of public service of the city, a man who has had great experience in such matters, and the figures given by Mr. Wyer, are alone sufficient to satisfy us that the valuation of Mr. Wyer is far wide of the mark. The difference in this item alone amounts to about $75,000. So that from the evidence, taking the same for all that it is worth, a satisfactory conclusion cannot be reached that this plant is worth more than $300,000. By what method is the matter of intangible values to be arrived at? Under the 18c rate fixed by the ordinance this company earned 10% on $430,000. Is it to be said that the intangible values are the difference between the physical elements of the plant and the sum upon which it earns ten per cent—$430,000? If so, an increase in rates to $60,000 net per year, automatically increases the intangible values, so that the intangible value of the plant would be the difference between the physical elements of the plant and $600,000. And a decrease in rate would cause automatically a corresponding decrease in intangible values. It becomes evident that values added to the property in this manner are derived from the license, privilege or franchise granted by the people, and is no way dependent upon the "cost of developing business, etc," and

"promotion, legal, organization, superintendency, contingent, interest during construction, etc., for which Mr. Wyer has made an enormous allowance. Without a penny of additional expense, without selling a single additional cubic foot of gas, a raise in rates under such a method of calculation means a raise in intangible values. The community through the instrumentality of its legislative body by a grant of higher rates becomes the sole, sovereign and controlling factor in determining what the intangible values are by this method. It becomes evident that any allowance for intangible values in excess of a fair value is an imposition upon the people from whom it derived the right to sell its product when such a method of valuation must come through their pocketbooks. This is especially so when the method of arriving at intangible values is as intangible as the intangible property itself. It is particularly true when it is admitted that the witness had no knowledge that anything was spent for such items, R. 23. The amount of capital stock issued and outstanding of this company was $81,600, R. 341, the amount allowed by Mr. Wyer for "promotion, legal, organization, superintendency, contingent, interest during construction," was $71,342. R. 56. No argument could make the statement of the engineer in this particular matter more ridiculous than a mere statement of it. His admission, R. 23, "that he had no opportunity of studying the early history of the company," finds very forcible expression in this glaring absurdity.

FINANCIAL HISTORY OF THE GAS COMPANY.

This company was organized in 1889 with a capital stock of $81,600, R. 338 and 339, and it is in evidence in this case that no additional capital has ever been put into it for any purpose except such as has been taken out of the earnings of the company, R. 340. Starting with the original investment of $81,600. the company took in the sum of $220,774.69, R. 359, and expended $273,615,41, R. 359, which expenditures included dividends in the amount of $41,616, R. 337. The record discloses the fact that the stock of this company was disposed of in 1898 for $101,560, R. 359 and 364. Deducting the dividends from the amount paid out and we get the total amount expended on the plant by the stockholders. Adding the amount received by the stockholders to the total receipts from operations we have the sum of $322,334.69 from which we deduct the amount expended exclusive of dividends and we find that the total profits of the stockholders during that period of time was $81,335.28, or a 10% a year.

From 1898 to 1902 the company received $503,379.53, R. 338, and expended for all purposes the sum of $239,-027.21, R. 338, showing a net profit over operations of the sum of $264,352.32, R. 338. The amount expended during this period includes an item of $114,317.03, R. 338, for the construction of an eight inch pipe line from Newark to Sugar Grove. Attention is directed to this item at this time as it has an important bearing in estimating profits that accrued hereafter.

From 1902 to and including 1911 the company received $2,031,763.34, and expended except for dividends and betterments the sum of $1,559,193.71 "Exhibit S" of the record, making its net profits during those years the enormous sum of $472,569.63. During this entire time the company operated under the rate which the company denominates an unreasonable one at this time. Prior to 1902 we can be certain only of the gross amount of receipts and expenditures and we do not know what portion of the money spent was spent for the betterment or installation of the plant. That the plant had a value of $101,560 in 1898 is in evidence, as is also the inventory of 1902, which fixes the value of the plant at $183,187.96, which includes an item of $60,000 for intangible values. So that there is an apparent net profit from gas operations from 1889 to and including 1911 of $818,257.23.

NET PROFITS OF THE NEWARK COMPANY.

The net profits as they appear on "Exhibit S," which chart was introduced by the company are stated incorrectly and we desire at this time to call the court's attention to some items that have been unaccounted for therein.

(a) The amount of meter rentals is not correctly stated. Mr. Suter's evidence, R. 239, show meter rentals in the sum of $14,124.50 in excess of those accounted for by Mr. Drolet.

(b) Miscellaneous earnings testified to by Suter and omitted by Drolet in the amount of $14,054.04, one item of which was the recovery of a back gas bill in the amount of $8,500.

(c) The sum of $480,968.78, R. 269, which was received by the Newark company from the sale of its main line and field. This was property built, purchased and paid for out of the earnings of the company prior to 1902. As pointed out herein before, one of the items was the construction of the eight inch line to Sugar Grove, which item alone amounted to $114,317.03, R. 338, which was included in the amount expended by the company from 1898 to 1902 before arriving at the profits of the company for that period. We are entitled to assume from the evidence that every cent invested by the Newark company, outside of the original investment, was taken from the profits of the company. This being the case, the sale of this property to the Logan company, and the obtaining of the purchase price thereof by the Newark company was the receipt of net profits mediately and not immediately, and all the dividends of the company paid out of this money were as truly paid out of the profits of the company as if they had been declared year by year when said profits really accrued. Therefore to said "Exhibit S" must be added the further sum of $480,968.78.

(d) The same line of reasoning compels the addition also of the interest earned by the company year by year, because it amounts to and becomes a part of the purchase price of said property. The company parted with the title to this property without compensation, the stockholders were entitled either to the profits accruing from its main line and field, or interest on the sum for which it was sold until it was paid for. They substituted interest for profits, and the accumulated interest became a part of the purchase price thereof. Whilst the matter

of interest cannot be said to be a legitimate gas earning, yet it cannot be said not to be a part of the profits of this company to be computed for the purpose of determining what the aggregate profits were from the time it began business until the present time. It only becomes important to determine how profitable the business of the company has been during its past history, in order to arrive at a proper conclusion as to whether the showing made has been a profitable or an unprofitable one. If the business has been unprofitable in past years and the hazard still continues or has become greater the company would be entitled to some consideration therefor. If, however, the business has been profitable during all these years, and the hazard to the investment has been removed by the paymnt of immense dividends under the rate in question even though the cost of production has increased, the company would not be entitled to more than a fair profit on the property used for the benefit of the public.

To the profits accounted for on "Exhibit S"	$ 472,569.63
Must be added "Additional meter rentals"	14,124.50
Must be added "Miscellaneous earnings"	14,054.04
Must be added "Sale of main line and field"	480,968.78
Must be added "Interest received on sale of property"	104,337.46
	$1,086,050.41
Adding to these profits the net profits from '89 to '98	81,335.28
And the net profits from 1898 to 1902.	264,352.32
We get the total net profits from 1889 to 1912	$1,431,738.01

These figures, however, do not include the betterments from 1889 to 1902, which as has been explained prior to 1902 no accurate account has been kept. It is a fair statement of the case, therefore, to say that the company has earned profits largely in excess of $1,431,738.01. This is the amount of money the citizens of the city have paid this company over and above its cost of operation and running expenses. Any calculation of the net profits of this company that does not include the above items fails to state the exact condition as it appears. The total net profits from 1902 to 1912 were largely in excess of the figures named above for the company paid dividends from 1904 to 1911 of $984,000, R. 594, 595, and had remaining a surplus of $166,000, R. 510, 511. So that the net profits from 1902 to 1912 amounted to $1,150,000 from all sources.

Assuming that the profits of the company during its history have been enormous, as the original investment has been returned to the stockholder many times during that time, the hazard of the business has been reduced a minimum, and this company is in no position to ask for or receive a rate that will allow it to make more than a fair return on the property it has devoted to the public use. The hazard is gone. With it also has gone the right to more than a fair profit. The company is entitled to a fair return on a fair value of the property, no more and no less. If it is entitled to its "pound of flesh," the city has the right and the duty of maintaining that no more than the pound be taken. We assume that the vital question herein is what are the present conditions, as the city has no right to fix a rate that is confiscatory but has a duty imposed upon it to fix a rate that will give

the company a fair profit on the fair value of its property. The company admits that it earned $43,210.60 in 1911, which is 10% of the value placed on the property by Mr. Wyer, whose valuation was $432,208; 14.26% was earned by the company on the value of the property as carried on the company's books, "Exhibit S," $302,889.02, and approximately the same percentage on the valuation of Mr. Lord,—which was $309,000. And this court is asked to say that a ten per cent profit on a valuation that is absurdly high amounts to confiscation. Having been surfeited with profits beyond the dreams of avarice, it now asks this court to extend its license so that its financial feast will know no end. Accustomed as it has been to 100% profits, 10% must surely look like confiscation to it. No other explanation for the attitude of this company appears or can be imagined.

RATE OF NET PROFITS.

The amount of net profits, amply sufficient as they have been to return the original investment many times, have been and are being earned on a rate that is lower than the rate fixed by the ordinance under consideration. Under the agreement between the Logan company and the Newark company the Logan company was to be paid 70% of the gross receipts. In other words it was entitled to receive 12.6 cents out of each eighteen cents received by the gas company. As a matter of fact the Logan company did not receive that amount, but did receive 11.76 cents per thousand cubic feet. It follows necessarily that the reason that it did not receive 12.6 cents

per thousand cubic feet is that it sold its product at a rate much less than the ordinance rate. The testimony disclosed that out of the 1,505,928 (Exhibit S. R.) cubic feet of gas sold by the Newark company, 600,000 cubic feet were sold at an average rate of 11.6 cents per thousand. R. 307. So that for 2/5 of the gas sold, the Logan company receives .0812 cents per thousand and for the other three-fifths received .126 cents per thousand cubic feet (R. 536, 537). So that the Logan company has voluntarily sold gas to the Newark company 600,000 thousand cubic feet of gas at .0812 cents per cubic feet and yet it attempts to show that every foot of that gas costs it .2001 (in 1911, Exhibit P) cents per thousand cubic feet in the field. The sale of this gas at this price is an absolute fact. The Newark company received 18 cents for approximately 900,000 cubic feet of gas, or about $162,000. It received .116 cents per thousand cu. ft. for approximately 600,000 thousand cu. ft. of gas, or approximately $69,600. Adding these two sums together and the result is $231,600, and the admitted receipts are $235,442.67, so that there can be no question concerning the amount the Logan company received for 2/5 of its gas. How is the court to reconcile the voluntary action of this company with the showing made on Exhibit P. Is this court to say from the testimony that gas sold in this manner and at this price was sold below the cost of production solely on the showing made by that company in Exhibit P, or is it not a fair inference that the voluntary sale of this gas by the Logan company at .0812 cents per thousand cu. ft. establishes the fact beyond any doubt that the cost of production is lower than that figure. If the amount of gas sold, which

was 1,505,928 thousands cu, ft., was sold at the rate fixed in the ordinance, 18 cents net, the amount realized from the sale of gas at that rate would have been $271,067.04. Instead of receiving that amount, the amount it did receive was $234,906.99, "Exhibit S," which was $36,-061.05 less than it might have received, if it had not elected to sell 2/5 of its product for about 7 cents per thousand cubic feet less than that rate. So that the total profits under the 18 cent rate might have been $79,271.65, instead of the $43,210.60 as shown. The expenses of this company in 1911 were $27,211.50, which calculated in the cost per thousand cubic feet on the basis of the amount sold 1,505,928 thousand cu. ft. shows the cost of operation to this Company of .018 cents per thousand cu. ft. Allowing the Company an eight per cent profit on its investment, $302,890, on the basis of the amount of gas sold in that year .016 cents profit per thousand cu-ft. will produce an 8% profit on that amount of money. So that the total amount this Company can possibly claim for distribution is .034 cents per thousand cubic feet. This amount subtracted from the eighteen cent rate would have allowed this Company to pay .146 cents per thousand cubic feet for gas and yet made an adequate and compensatory profit on its investment. Or taking actual working conditions into consideration, the Newark company received .156 cents per thousand for all the gas it sold in 1911. Subtracting .034 cents per thousand feet from the amount received, leaves the balance .122 cents per thousand cu. ft. available for the cost of gas. The amount actually paid was .109 cents per thousand cu. ft., so that the Newark company could have paid .013 cents per thousand cu. ft. additional for its gas

and yet paid all operating expenses and an eight per cent profit. In other words the Newark company could have paid the Logan company $183,464.29, instead of the amount actually paid which was $164,809.89. The contract between these two companies provided that the Newark company was to sell gas at not less than twenty-five cents. This agreement so far as the price is concerned was never carried out, but some other arrangement as to price was substituted, what that arrangement was the record does not disclose. The business statements of the Company show, however, that the division of the gross receipts was upon the basis fixed by the contract, that is, the Newark company was to receive 30% and the Logan company 70% of these receipts. The evidence further discloses that 600,000 thousand cu. ft. of gas were disposed of in Newark for .116 cents per thousand cu. ft. R. 307. That the action of the Newark company in selling its product at such rate and the assent of the Logan company to the sale of the same was purely voluntary, as the company had the right to charge 18 cents for every thousand cu. ft. of gas sold. Is the Newark company or the Logan company to be heard to complain of a rate as being confiscatory when it sees fit to dispose of its product voluntarily at approximately 1/3 of what it claims the gas costs, adopting their figures for depreciation, interest, profit, and transportation? Are either of these companies to be heard to complain of a retail rate, as being unprofitable, when they voluntarily dispose of 2/5 of their product for less than half that rate? It is fair to assume that the wholesale rate was profitable for it was not dependent upon or influenced by the ordinance rate, and it being profitable, the retail

rate must necessarily be profitable. It is fair to assume that the Logan company would not part with one cu. ft. of its gas below the cost of production. It may reduce its margin of profit on gas sold in a wholesale way. But this court has the right to doubt the bona fides of a statement or exhibit, such as "Exhibit P" that pretends to show a cost of production .1189 cents per thousand cu. ft. more than what it voluntarily sold its gas for. As between "Exhibit P" and the action of the Company in disposing of its gas at .0812 cents per thousand cu. ft. there could be but little doubt as which should be chosen. One is the direct and positive action of a company that has made millions of dollars in profits from the sale of its products, the other is a statement framed with self-interest, the correctness of which is denied by its own actions of record.

Bearing on the matter of the rate of interest that a public service corporation is entitled to earn, the reasoning of the Supreme Court of Iowa is very forceful and instructive:

> "The fixing of rates for a public service corporation is a legislative function, and the duty of the court ends when the court has determined that the rates are so low as clearly to be confiscatory. The court cannot say that the income of a public service corporation must necessarily exceed 5% above expenses, including taxes, to avoid the charge of being confiscatory, and what compensation would be reasonable is a question of fact to be determined in the light of the evidence of each particular case. When government bonds bearing 2% annual interest are selling at a premium, and those issued by state and municipality a little if any more than double such rate are in demand, and when the current rate of interest on gilt edge securities on real estate or public service corporations rarely exceeds

5%, it will not do for the courts to say that the income, above all expenses, including taxes on property devoted to public use must necessarily exceed the last mentioned rate in order to avoid the charge of being confiscatory."

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 120 N. W. 966.

This court in passing upon this same proposition in the case of Wilcox v. Consolidated Gas Company, at page 19, in no uncertain language defined its attitude in the matter of the rate of return to which a public service company is entitled:

"Gas rates which will yield a return of six per cent upon the fair value of the property actually used by such company in its business are not confiscatory. There is no particular rate of compensation which any corporation subject to legislative control has the right to obtain without legislative interference"

So that this court is asked to say that 10% upon the very highest value placed upon the property of this plaintiff in error,—that of Mr. Wyer, or 14.2% on the valuation placed upon the property by Mr. Lord, who made no allowance for depreciation, and the same percentage on the actual value of the property carried on the books of the company, which includes all intangible values and makes no allowance for depreciation, amounts to and is confiscatory, and by reason thereof is in contravention of the Fourteenth Amendment to the constitution of the United States.

DIFFERENT THEORIES ADOPTED AS TO METHOD FOR DETERMINING A PROPER GAS RATE.

The Company did not confine itself to any one particular method of determining a proper rate, but produced testimony upon different lines to support their contention. These methods may be briefly stated as (A) opinion evidence; (B) the market value of gas; (C) the cost of production; (D) the contract theory. We will take up and discuss each of the methods named in their order.

(A)

John M. Girard, D. A. Upham, M. E. Lytle, J. B. Waight, F. O. Levering, D. W. Wallace, Fenwick Ewing, S. S. Wyer were called as witnesses. Each had experience in the natural gas business, some are actively engaged in the business, and some retired from it. Each gave opinions as to what was a fair price of gas for the city of Newark. The opinions given were based upon the price other companies were receiving at other places for natural gas, and were not based upon any knowledge of the plant, the cost of operation of the same or the net profits earned.. So that the testimony of these witnesses on this subject lacked a proper legal predicate. The absurdity of testimony of this kind must appear at a glance. In the first place we are not concerned with what it costs to produce gas for other cities. In the second place the amount of net profits earned by companies in other places and the valuation of their properties must be shown in order to arrive at any conclusion as to whether the rates in such places were fair or unfair. In the

third place the Company would be entitled to a higher rate than any other place if the evidence disclosed that the cost of gas in Newark was higher and necessarily a lower rate than other places if the cost of gas was lower. What the court is concerned about is, what does it cost to furnish gas to the city of Newark, what are the operating expenses, what is the value of the plant and what amount of net profits can be earned upon that valuation? Such testimony might throw some light on the subject, if all the conditions mentioned were the same, but the court is not informed as to conditions, and obviously could not be, for it would involve an examination of all the properties with which the witnesses had experience.

(B)

Proof was attempted to be made by the plaintiff in error that there was a market price for gas. In addition to the objections raised by us under the first method of determining a proper rate, we claim that there is no such thing as market price for natural gas, and that if the record shows anything on this subject the showing is considerably below the figures advanced by the company as its predicate for a rate. If there was such a thing as a fairly uniform price paid for gas, the Company would be entitled to more than the market price, if the rate fixed were so low as to make it confiscatory, and on the other hand, the Company would not be entitled to the market price if the rate fixed was below such price and still yielded a fair return on the fair value of the property devoted to the public use. That there is no such a thing as a market price is evidenced by the fact that Columbus pays 30c, R. 69; Zanesville,

farther from the field than Columbus, pays 25c., R. 171; Coshocton and Mansfield, still farther away than either, pay 25c, R. 69; Mt. Vernon, which is located in reference to the Homer-Licking field about the same as Newark, pays 18c, R. 163; and this rate is a purely voluntary rate as the Company has the right to charge 20c, R. 163, under its ordinance. The rates just mentioned are retail rates. Mansfield is sixty-five from Newark, and at least fifty miles from the field and yet the Logan company sells its product to Mansfield at 25c, requiring as it does the large additional investment of main line, and the large pumping station at Bangs, which investments in no way aid the Company in the supply of its gas at Newark. The Ohio Fuel and Supply Company is furnishing gas to Mt. Vernon at 18c, and as before stated this city is located about the same distance from the field as Newark. Now, John M. Girard, vice president and general manager of The Ohio Fuel and Supply Company, referred to as one of the witnesses who gave their opinion as to a proper rate for the city of Newark at 30c, R. 305. Mr. Girard, on behalf of that company seems to be afflicted with the same sort of a mental stigmatism as the officers of the Logan company, for he can approve the voluntary sale of gas at Mt. Vernon at 18c, R. 174, but thinks that Newark ought to pay 12c more.

If the Ohio Fuel and Supply Company can voluntarily sell its product at Mt. Vernon at a profit for 18c, it is fair to assume that such a rate for Newark under similar conditions would be a fair rate. Marietta was paying 18c, R. 69; Utica, Ohio, which is contiguous to and almost within the Knox-Licking field, was paying 15c, R. 69. Some of the producing companies supply gas at

wholesale to companies who distribute the same in some of the cities. Mr. Ewing, testifying on behalf of The Columbus Natural Gas Company, R. 301, that this Company entered into a contract for the delivery of gas at the city limits of Columbus from September 1, 1913, for a period of five years for 12½c. That prior to that time gas had been sold by this Company at the same source for 10c; Bellevue pays .1932c wholesale, R. 486; Fremont, farther away than Bellevue, pays .1603c, R. 486; Springfield, seventy-five miles from Newark, 21c, R. 173; Hamilton, yet farther away, 20c, R. 173; Middletown, closer to the field than Hamilton, 21c, R. 173; Cincinnati, farthest from the field, 18c, R. 173. Gas is wholesaled at Columbus by The Ohio Fuel and Supply Company as low as 10c, R. 179; Mr. Upham wholesales gas at Mt. Vernon for 10c in the summer and 12c in the winter, R. 162. Mr. Graham, a producer in the Homer-Knox field is selling a million cu. ft. a day at 5c, R. 334; The Ohio Fuel and Supply Company, which constructed a pipe line to Cincinnati at a cost of $2,500,000, is delivering 2,500,000 thousand cu. ft. of gas per year to Cincinnati for 18 cents, R. 173, 175, 176. Deducting 10 cents a thousand from this price for interest on their investment, which we assume for the purpose of this calculation, and we arrive the price of the gas in field, which would be .08c. Out of which this Company must get its cost of production, depreciation on the field, interest on its investment in the field, before we arrive at a figure which will give us the cost of gas in the field. The allowance of 10c a thousand on the amount of gas sold in this instance is equivalent to a 10% profit. Eight cents per thousand would produce 8%. The figures are

interchangeable, as the investment figures and the amount of gas agreed to be delivered are the same. We are once more confronted by the fact that this company is disposing of a large portion of its gas at .08c, the same as the Logan company is in Newark, so that, either the price received for gas at Cincinnati is a ruinously low price or the opinion of Mr. Girard as what rate Newark should pay is prompted by his friendship for the offiers of The Newark Company. There is only one conclusion that can be drawn from these facts and that is anything approaching a market price for gas, either at wholesale or retail, is a pure figment of the imagination. The one fact that stands out boldly from all the webs of theory attempted to be spun, is that these gas companies, producers and distributors alike, get such a profitable rate from each city as it is possible to get, and that, too, without any reference to either investment or cost of production. That these companies have been favored with high rates and enormous profits in the past through the ignorance of the public that has been served, as to the real value of the product is neither a reason or an excuse why such conditions should be continued without let or hindrance. The Company under Section 3982 of the General Code, in so far as the rate to be charged by it is concerned, is subject to regulation. The City of Newark, under the authority conferred on it by that statute has seen fit to exercise its power in that respect. That action must stand unless the evidence of confiscation offered by the Company is to the satisfaction of this court clearly apparent. We desire once more to direct the court's attention to the fact that the Newark company was satisfied to receive .116c for

2/5 of its product in Newark, in 1911, and the Logan company was satisfied to receive .0812c of that gas so sold, and yet these companies are not satisfied to receive 18c for the remaining three-fifths, the share of the Logan company in the gas so sold being .126c. The Logan company receiving .0438c more for its gas sold at retail than that sold at wholesale. The Newark company receiving .054c more for its gas sold at retail than that sold at wholesale. In conclusion we again suggest that if the wholesale rate, which is purely voluntary, is profitable, the retail rate must necessarily be more profitable, and the showing of either of these companies to the contrary cannot justify nor explain the positive and conclusive action of these companies in this matter.

The market value of a service under a varied schedule must be distinguished from the market value of a commodity and especially is this true since there is no varied schedule for the court to consider and the rate in question affects the entire service. The market value or the value to patrons of a particular rate on a varied schedule can hardly be determined by any other method. In such cases it would be impossible to see what return the rate would allow, as it is only one of a large and complicated schedule. It has never been held, where a corporation has devoted its property to the public service and its whole schedule is under consideration, that the market value of its services or commodity or their value to the consumers are to be considered in determining the reasonableness of a rate. The value of a particular rate in a varied schedule may be determined that way, but even under this method of determining the reasonableness or unreasonableness of a particular rate, is subject to

the legislative right to regulate so that the net earnings of the entire schedule should not exceed more than a fair return on the property devoted to the public use. Therefor, we insist that as a matter of law, this evidence is incompetent and ought not to be considered by the court.

See Cotting v. Godard, 183 U. S. 85, also,
Commerce Commission v. L. & N. R. R., 118 Fed. 613.
Southern Pacific R. R. Co. v. Commerce Commission, 117 Fed. 963.

(C)

The next theory advanced by the plaintiff in error in attempting to solve the matter of determining what the rate should be was the attempted proof of the "cost of production": If the Company performed all acts incident to the production, transportation and distribution of the product it sells, there could not be any question but what the matter of the cost of production would be a very vital and essential factor to be determined in arriving at the reasonableness or unreasonableness of the rate in question. Whether or not the same should be considered in arriving at conclusion in this matter depends altogether upon what relation or control, if any this Company has over the matter of production. We think that the cost of production does not become one of the vital or controlling factors in this case for the following reasons:—

(1) The city of Newark is located within a few miles of a large gas field, and the cost of the transportation of gas from the field to the city is less than for cities farther removed. Each additional mile of pipe line, with its rights of way, etc., constitutes additional investment

upon which the Company may be entitled to financial return from other plans. The evidence as disclosed by the record shows that sixty per cent of the gas obtained by the city of Newark came from that field. The evidence further discloses the fact that north of Newark, the Logan Company at a cost of $323,371.42 constructed what is known as a pumping station at Bangs, O., R. 256. Now, this pumping station gathers the gas, that is all that is not sent to Newark, and sends the same to cities north of this station, so that the pumping station plays no part in the sending of gas to the city of Newark, R. 208. The total output of gas at that time from the Homer field was 26,000,000 cu. ft. daily, R. 210, or 7,300,000,000 cu. ft. yearly, and Newark consumed approximately 1,500,000,000 cu. ft. yearly. Exhibit "S." As pointed out in our reply brief on motion to dismiss or affirm the gas that was furnished to Newark from this field came to the city from the natural well pressure. As also pointed out in the same brief forty per cent of the gas consumed by the city of Newark came from West Virginia, and was purchased by the Logan Company from The Connecting Gas Company at Sugar Grove, Ohio, and transported by the Logan Company through their lines to the city of Newark. This record does not disclose and is silent in the matter of the cost of the gas so purchased either to the Logan Company or to the Newark Company. All the plaintiff in error can possibly claim for the figures and exhibits presented to the court, is what they might tend to show in the way of the cost of production. So that if the cost of production is not involved but it has become a question of the cost of purchase and the record is silent on that subject

there is a failure of proof affecting one of the most vital issues in the case. It is plain to be seen that if the Logan Company had as a matter of fact purchased all of its gas from the Connecting Gas Company and sold the same to the Newark Company the matter of the cost of production could not possibly be involved. So that for 2/5 of the gas delivered to Newark there is no proof as to what the same cost. The reason why no testimony was introduced by the Company on the cost of gas purchased at Sugar Grove might be conclusively presumed by reason of the fact of its omission, but the proof develops a condition that, upon consideration would seem to establish the conclusion that it was omitted because it would show that West Virginia gas could be purchased and delivered in Central Ohio much cheaper than Ohio gas could be produced. It is in evidence that the Logan Company is producing in the Homer-Licking field about five times as much gas as it would take to supply the city of Newark, and the very fact that the gas from the field is gathered into the pumping station and transported north, not leaving enough to supply Newark, and making up the deficiency in the supply at Newark by the purchase of West Virginia gas, leaves room for but little doubt but that this voluntary action on their part is prompted by economical considerations in that it is cheaper to supply Newark with West Virginia gas than with the gas produced from the Homer-Licking field.

(2) If the cost of production is to become a factor in arriving at the reasonableness of the rate in question, it is to be the cost of production generally, or the cost of production incident to the production of gas for Newark? In either method adopted the ultimate conclusion to be

reached is what does it cost to deliver gas to the city of Newark? The method adopted by the plaintiff in error in arriving at the cost of production was to charge the total cost of operation against the total amount of gas produced in all fields. The record discloses that the Logan Company has under lease approximately 466,000 acres in Ohio, R. 254, covering the Sugar Grove, Ashland, Homer and Lorain fields. The total acreage in the Homer field, from which Newark gets 60% of its gas, is 43,000, R. 254, the rental item alone amounting to about $1.00 per acre, R. 444, R. 254. The separate maintenance expense of the different fields could have been shown by the Logan Company, R. 279, yet the Logan Company did not see fit to separate the cost of operation of the different fields, as the showing of the general cost of production is necessarily higher by lumping them together. Newark gets no gas from the Ashland or Lorain fields, and derives no advantage from the pumping station at Bangs,, so that the investment in those fields and in that property should be excluded in the consideration of the matter of the cost of production for the city of Newark. As pointed out in the brief herein referred to the gas in the Homer wells that is being supplied to Newark comes to Newark under the natural well pressure. How many wells there are, the cost of drilling the same, maintenance cost, royalties, rentals, etc., are all matters of exact determination, yet the record is silent on this subject. If the gas delivered to Newark came from a common source, at a common cost of operation, wherein the entire property of the company was involved in the delivery of the same, the method employed by the plaintiff in error in determining the cost of production would

be clearly justified. But when only a small part of the property of the company is used to produce and deliver gas for Newark, and this small portion is distinct and severable from the other property of the Logan Company, it appears to us to be equally clear that the cost of production must be determined from the property used for that purpose, and any other method used must be unreliable and unjust. As before stated the proposition which the court must determine, if it should deem it necessary to go into the subject at all, is what does it cost to produce gas for Newark? The fact that Newark receives no benefit whatever from the Ashland and Lorain fields, and derives no advantage from the immense pumping stations, that are used exclusively for the supply of cities north of said station, any calculation by which the operation of these properties is used to obtain the cost of production for Newark would not only be unjust but lead to absurd results. The maintenance of these properties for the towns north being necessarily involved in their cost of production, their cost of operation must be considered in so far as they are benefited. The court is not concerned what it costs to produce gas for Columbus, Mansfield, Dayton or Springfield, but is concerned in the matter of what it costs to produce gas for Newark. So far as Newark is concerned the Ashland and Lorain fields and the pumping station at Bangs could be wiped from the earth and Newark would still receive its supply of gas without diminution of supply. These investments involve the cost of supply to the cities that are benefited by them. The money placed in these properties by the Logan Company was an added investment for new business and we fail to see upon what theory such mathe-

matical legerdemain can be justified. Newark is getting from the Homer-Licking field 900,000,000 cubic feet of gas, and the Logan Company with its immense investment in the Bangs pumping station is sending from this same field annually 9,300,000,000 cubic feet of gas to northern cities where it mixes with the gas of the Ashland and Lorain fields. Our contention is, and it is no way involved, that if the cost of production becomes important in this case, that its cost should be ascertained in this manner. The cost of production of gas for Newark, should be the cost of production and the carrier charges from the field with a reasonable profit on the investment. That the cost to a city farther removed, should be the cost of production and carrier charges that allows a fair profit on the additional mileage of pipe necessary to deliver gas to said city. We contend that the city of Newark has the right to have the matter of its location near its source of supply taken into consideration. That it costs more to produce gas for other localities or cities farther removed does not in any way negative the right of the city of Newark to have its advantage in this respect considered. It is a matter of common knowledge that oranges and bananas and all tropical fruits are cheaper in the south than they are in north because of the transportation charges. The farmer who obtains the market price for his hay, makes more profit than his brother who has to pay transportation charges to meet that price. So that gas obtained in Licking county can be sold there at a great deal lower rate than it could be sold in Cincinnati, because the investment necessary to market the product in Licking county is necessarily less than it would be in the case of The Ohio

Fuel and Supply Company with its $2,500,000 additional investment for transportation. The only way the action of the Logan Company in selling 2/5 of its product in Newark at .0812 c per M. C. F. can possibly be justified or explained is that the cost of production of gas sold in Newark is below that figure. The action of the company in disposing of gas at that rate demonstrates conclusively that the cost of production of the gas sold in Newark is below that figure. It further demonstrates that these companies in the sale of such gas recognize the advantage of location that Newark bears to the Homer field, and the additional advantage of sending its product here under a natural well pressure, and without the employment of the expensive pumping process that is required in serving most all the other communities it serves. The investment necessary to maintain the field and wells that produce 3/5 of the gas sold in Newark would be necessarily a very small one as compared with the investment necessary to maintain the field, wells and pumping stations supplying gas to other communities. The direct and positive action of these companies recognizing the difference in the cost of producing gas for the city of Newark and the production of gas generally finding expression as it does in the voluntary sale of 2/5 of the gas sold at .0812 c per M. C. F., and leads to the conclusion that the cost of gas sold in Newark could have been shown separate and apart from its other operations, and as the plaintiff in error failed or refused to disclose this cost, there has been a failure of proof of this important factor.

(3) If the cost of production is to be considered as an important factor in this case the fact that the Newark

and Logan companies sold gas at wholesale in Newark for an average price of .116 c per M. C. F., R. 307, out of which sum the Newark company got .0348 c per M. C. F. and the Logan company got .0812 c per M. C. F., R. 307, concludes all speculation as to what the cost of production really is. The action of these companies in selling gas at this rate is purely voluntary, and there is no necessity for the consideration of schedules or exhibits that are not designed to show the real truth of the situation, but are designed to color the same so that the court may be misled and adopt the views the Company desires in the matter. This company can well afford to sell their product from the Homer-Licking field at wholesale at the price it does sell the same for the investment necessary to produce and transport this gas to the city of Newark is necessarily a very small one, as the gas comes into Newark from the natural well pressure. Practically all of the gas sold at wholesale can be charged to the Homer field. Three-fifths of all the gas sold comes from the Homer-Licking field and two-fifths of all the gas sold was sold at wholesale. It has been argued that the Company can afford to sell its gas at wholesale cheaper than it can at retail for the reason that it does not require the amount of investment at wholesale that it does at retail. This argument is not tenable for two reasons: (a) It is obviously absurd to say that this company or any other Company is going to voluntarily make a wholesale rate that is not profitable or that is below the cost of production. (b) So far as the Company is concerned their right to operate in and through the streets of the city of Newark, Ohio, is dependent upon their franchise, which applies alike to both wholesale and retail rates. It could

no more sell one c. f. of gas at wholesale without a grant of permission from the city of Newark, than it can at retail, so that, however, so much more desirable may appear to the Company the wholesale feature of its business than its retail business, it is enjoined under its grant to furnish gas to the citizens at a rate not to exceed .18 c. net per M. C. F., and if it should see profit and advantage in marketing its product at a lower rate than that fixed by the ordinance, it is permitted so to do. All the ordinance does is to fix the maximum rate to be charged at eighteen cents net, and the very fact that this Company furnishes gas at the low rate mentioned establishes clearly and satisfactorily that the wholesale rate is profitable and that the retail rate must necessarily be profitable.

(4) If the cost of production is to be considered as a factor in arriving at the reasonableness of the rate fixed why should the cost of production of the Logan Company alone be selected? The Newark Company being solely and exclusively a distributing company, must buy its gas, unless it was forced to take the product of the Logan Company by virtue of some contract or arrangement of affairs between the companies whereby the entities or individuality of both became merged. What is the showing of the record in this matter? We contend that so far as the real merits of the controversy at issue is concerned, it makes but little difference which view of the matter is taken. If these companies are separate and distinct and the Newark Company must purchase the gas it sells, "purchase cost" must be substituted for "production cost." If these companies are separate and distinct "production cost" of the Logan Company becomes irrelevant as neither the city nor the Newark Company

can be bound by the Logan Company "production cost" as there are a large number of other companies operating in the field with which the Newark Company would be free to contract. As pointed out in the reply brief filed in the "Motion to Dismiss or Affirm," it has been the contention of the Company ever since this case was started that these companies were separate and distinct entities. Assuming, however, that the production cost of the Logan Company must be considered, and that the general cost of production computed from the entire cost of operation in all the fields on the basis of the total amount of gas produced, what is the showing of the Logan Company along this line? The cost of production as shown by "Exhibit P" is .1061 c per M. C. F. We again direct the attention of the court to the fact that in spite of the showing made on "Exhibit P" concerning the cost of production, the Logan Company sold two-fifths of its product in the city of Newark for .0812 c per M. C. F., R. 307, or at a net loss of .0249 c per M. C. F. This, as has been pointed out, is not because it was necessary to do so under the ordinance but was the business act of a big business corporation that has shown remarkable ability in accumulating large profits. The fairy stories of modern finance would not be complete without a few remarks concerning the Logan Company. Starting in business in 1894 with a capital stock of $40,000, R. 279, from 1902 to 1912 this company paid $4,760,000 in dividends, "Exhibit U," what dividends were paid prior to that time is not in evidence. The capital stock of this company remained at those figures until 1911, the same year this law suit was started, when the same was increased by a stock dividend to $10,000,000, R. 279,

and the investment as shown in 1911, "Exhibit U," was $10,837,842.37. If the financial history of this company had been an unprofitable one, the showing made on "Exhibit P" concerning the cost of operation would clearly indicate the reason of it. The Logan Company paid $800,000 in dividends in 1911, "Exhibit U," showing conclusively the ravages of confiscation. The cost of production as shown by the record herein was ascertained, as claimed, by allowances for depreciation and profit on the field investment. The field investment amounted to $5,961,562.86, R. 302, and this statement of the auditor of the Company as to what the investment of the Company is, is the only thing that appears in the record of this case that in any way indicates the value of the property upon which this calculation is based. **No value was attempted to be placed upon the field property of the Logan Company by any person having or claiming to have knowledge of the same.** No depreciation was ever calculated upon the field investment of this Company, R. 533, and this Company through its auditor claimed that the annual depreciation of field property amounted to 8%, R. 305. So that computations made on "Exhibit P" are wrong for two reasons: (a) No value was placed upon the property; (b) No depreciation was ever allowed and from the showing made in the record, the depreciation is necessarily an enormous one. If the cost of production becomes pertinent to the issue herein, and it is necessary to consider the cost of production of the Logan Company, the value of the property involved in the production of the gas become a necessary and material element in arriving at a conclusion as to what that cost may be. The plaintiff in error

having failed to produce any evidence of the value of that property necessarily fails to make proof of the most important element concerned in arriving at the cost of production, and the conclusions arrived at in "Exhibit P" are without any proper legal predicate.

(D)

The next theory advanced by the Company for the determination of the reasonableness or unreasonableness of the rate in question, is the "contract theory." The Company, R. 478, introduced a contract between the Logan Company and the Newark Company for the sale of gas to the Newark Company by the Logan Company for a period of ten years from the 1st day of March, 1903, a copy of which contract appears in the original "Motion to Dismiss or Affirm" filed herein. Why did the Company introduce this contract in evidence? This contract was introduced on the theory that these companies were separate and distinct, and that it was a binding obligation upon both, and that it was upon these theories that the evidence concerning the operation of the Logan Company was introduced. The Logan Company saw fit to introduce its business into the court for the purpose of upholding the contentions of the Newark Company, but did not seek to be made a party to the proceedings herein, knowing as it did the liason existing between said companies, and the showing made could have been insisted upon as a matter of right, and not as it was, the mere matter of the courtesy of the courts that tried the issues. The attitude of counsel is shown, R. 270, where the connection was attempted to be made on the basis of inde-

pendent operations. What the position of counsel was in this matter in the Supreme Court of Ohio, has already been stated in our reply brief on the "Motion to Dismiss or Affirm," and the introduction of this contract could serve no other purpose than to show the basis of operations between these companies as separate and distinct entities and a binding obligation on both. Whether these companies are separate entities or not should make but little difference in arriving at a proper conclusion of this matter. This contract was evidently intended to be a fair distribution of the profits to each of the companies during the life thereof. It was a satisfactory business adjustment at the time it was made, and the continued adoption of the terms of division of the money earned, is proof positive that not only was it regarded as a binding obligation, but that it was a fair distribution of the proceeds of the sale of gas between the two companies. That these corporations were separately organized by different people under the laws of Ohio, with distinct charters granted at different times, that each performs separate and distinct functions cannot and will not be denied. The corporate existence of each has been and is being kept intact. Each while maintaining a separate corporate existence has a right to perform acts necessary and incidental to its corporate life. The franchise agreement entered into by the Newark Company in 1898, was a contract solely and exclusively with that company and the Logan Company was in no way party to the same, and when the action of Newark Company in declining to sell its gas at the rate fixed by the ordinance became a matter for the consideration of all the parties concerned, this action was commenced against the Newark company

and the Logan Company was not made a party thereto as there was no privity of contract between the city and the Logan Company. It is our contention that whether the contract that existed between the Logan Company and the Newark Company from March 1st, 1903 to March 1st, 1913, be regarded in the light of a binding obligation or in the light of a proper distribution of the proceeds of the sale of gas, the effect of the agreement is the same. Section 9038 provides the method by which corporations may consolidate. No such action was taken by these companies. Because, as is disclosed by the record, R. 253, the Union Natural Gas Corporation is the largest stockholder of both of these corporations, is no reason why either of said companies have a right to deny their obligations, and it would be singular indeed if such a defense should be permitted. **Nowhere in the defense urged by the Newark Company in its pleadings, is the question of what effect the rate would have on the Logan Company by reason of any unification of interests, urged.** The claim is urged as being in violation of Sec. 1, Article 14 of the amendment to the Constitution of the United States by reason of the effect of the rate on the Newark Company. Is the Newark Company entitled to the benefit of a defense urged in its own behalf, when all that can possibly be claimed by the evidence is the violation of the 14th amendment of the Constitution complained of affects the Logan Company. If there was any substance or justice, or even truth in the claim, the pleadings in the case should have shown that the Logan Company was the party aggrieved, and that the Logan Company was a necessary party to the proper determination of the issues raised. This twelfth hour change of front

by which the Newark Company seeks to have the cost of production considered, by reason of the fact that the Logan Company is aggrieved, is not a matter at issue between the parties to this case at this time. There was a proper time and place where that matter could have been presented and urged, but it seems to us that this is neither the proper time nor the proper place. The only question raised by the pleadings in this case is the effect the rate fixed by the city will have on the business of the Newark Company. This Company and the Logan Company sought to and did by their contract determine and fix the relations of the one company with the other, and, we repeat, that condition was to obtain to March 1st, 1913. This suit was commenced on the 25th day of April, 1911, and this agreement had yet to run a period of about two years. The division of the gross receipts for 1911, the last year any showing of business was made by the Company, was upon the basis of the terms fixed by the contract. So that the attitude of both of these companies towards this contract was that the same constituted and was a binding obligation on the parties thereto. If the Logan Company was not being properly compensated for its product, and these companies were one and the same proposition why was the division of the gross receipts continued in the manner fixed by this agreement. when the record discloses that the Newark Company was making enormous profits, more profits as a matter of fact than it was properly entitled to earn on the fair value of the property devoted to public use? Does it lie in the mouths of these gentlemen to come into court at this time, when it is clearly apparent that more than adequate profits have been made on the very highest valu-

ations placed upon the property of the Newark Company, and urge the effect the rate in question will have on the Logan Company, when no issue has been joined in reference to that company and that company was never made, or even asked to be made a party to the proceedings wherein it is now claimed by the Newark Company that the Logan Company is affected. It is our contention that so far as the showing and claims made by the Company in this case there is but one method the court can properly use in arriving at any conclusion as to the merits of the case at bar. And that is to treat the contract introduced by the Company as a binding obligation between the parties thereto. This contract was introduced by the Company as a means of determining the justice of its claims, and that was the plain, distinct and unalterable attitude of this Company during the entire course of proceedings in the State of Ohio. That this Company can now adopt a different attitude, and admit as it does on page 9 of the "answer brief," filed on the "Motion to Dismiss or Affirm," "that there was never any serious contention that for the purpose of distribution there was a fair profit made," and insist now for the first time that these companies were one and the same and claim that it admits that the action so far as the Newark Company was not in violation of the 14th amendment to the Constitution of the United States, and urge that it was in violation of said amendment as to a party who is not before the court, which has seen fit to submit its business to the court in support of the proposition that these companies were separate and distinct, leads us to the conclusion that the Company has admitted conclusively that there is no merit in any of its

contentions. This case was tried in February, 1913, before the Common Pleas Court and in May, 1914, before the Court of Appeals, and no evidence was offered by the Company as to what the arrangement between the companies was during any of that time. No evidence was offered by either of these companies of their business in the years 1912, 1913 and 1914. This court adopted the attitude in the case of Knoxville v. Knoxville Water Co., 212 U. S. 1:

> "We think it error to confine the investigation to and base the judgment upon that year alone. The precise subject of inquiry was what would be the effect of the ordinance in the future. The operations for the preceding fiscal year were valueless, if the preceding year was abnormal, and were only of significance so far as they foretold the future."

And yet with the authority of that case at hand, these companies saw fit to withhold their business from the court in the years 1912, 1913 and 1914. The record is silent on these matters. We might speculate and theorize as to what conditions actually were, we might assume that the profits were as large or larger, that a new and more favorable contract was made by the Company, or that the companies still operated under the same contract, but that does not supply the proof that is lacking, that is not the answer to the law laid down by this court.

> " 'The case must be a clear one before the courts should be asked to interfere by injunction in advance of any actual experience of the practical result of rates.' A court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under such rates."
>
> Wilcox v. Consolidated Gas Co., 212 U. S. 19.

"When the case rests as it does here, not upon observation of the actual operation under the ordinance but upon speculations as to its effect based upon operations of a prior fiscal year, we will not guess whether the substantial return to be earned would lack something of the return which would save the effect of the ordinance from confiscation."

Knoxville v. Knoxville Water Co., 212 U. S. 382.

"The refusal of a court to enjoin the enforcement of gas rates fixed by municipal ordinance upon the conclusion reached that a return of six per cent per annum on the valuation of the gas company's property would not be confiscatory will not be disturbed on appeal, especially where the ordinance was attacked before an opportunity was afforded to test the results by actual experience."

Des Moines Gas Co. v. City of Des Moines, 238 U. S. 150.

To a like effect was the opinion of the court in State v. Adams Express Co., 85 Neb. 85; 122 N. W. 691; State v. Wells, Fargo & Co., 85 Neb. 42; 122 N. W. 697.

"A court of equity should not hold invalid an act of the legislature fixing maximum rates of a carrier until a fair trial has been had of continuing business under the statute."

Again this court held:

"The jurisdiction which is invoked ought only to be exercised in the **clearest cases.** If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be **prepared to show to the satisfaction of the court** that the **ordinance will necessarily be so confiscatory in its effects** as to violate the constitution of the United States."

With the position of this court clearly defined in these matters the Company chose to withhold from the court its actual experience under the rate claimed to be confiscatory, and it now asks this court to base its judgment on the record of the operation of these companies in prior years and guess and speculate as to what the actual and necessary result was in the years 1912, 1913 and 1914, when this evidence was in its possession and not offered. More than threee years had elapsed since the passage of the ordinance before the case was tried before the Court of Appeals, and yet the only evidence offered as to actual operation was a part of the year 1911. How is this court to determine that this rate is confiscatory when the record of the operations of the Newark Company and the Logan Company is not before it for the years mentioned but has been actually withheld? If the actual price paid for the gas since that time was before the court which together with the net profits and the added or depleted value of the plant during those years, the court would have something upon which to predicate an opinion, and would not have to indulge in guessing or speculation as to what the results possibly or probably were. The rule pointed out by this court "that the jurisdiction invoked ought only to be exercised in the clearest cases" was not followed by the Company in this case. The rule "that complainant must be **prepared to show to the satisfaction of the court will necessarily** be so confiscatory in its effects as to violate the Constitution of the United States," is met by total failure of proof on the most vital and essential factors in the case.

EXHIBITS OF THE NEWARK NATURAL GAS AND FUEL COMPANY.

The defense of the Company is based largely, if not exclusively on certain exhibits herein. All the calculations made by the Company assume the correctness of these exhibits. We assert that the evidence discloses that these exhibits are incorrect, and so incorrect that any computations made therefrom must lead to incorrect results. It is our contention that even assuming the correctness of these figures and exhibits that there can be no question of confiscation in this record, and an examination of the testimony only furnishes additional reasons why there can be no such question here. The profits of the Company are largely in excess of the profits admitted in their exhibits, and the testimony is so much at variance with the same that but one conclusion can be reached and that is, the Company did not make a true disclosure of its business. We desire to call the court's attention to the particular matters wherein the more flagrant of these variances appear.

(1) Plaintiff in error, R. 269 and 270, attempts to show a complete statement of its business, and that statement would appear something in this form:

Dividend paid in 1911		$984,000.00
Earnings, 1902 to 1912, Exhibit S (originally)	$442,569.63	
Less betterments same years Exhibit S	82,445.33	
Net earnings		$360,124.25

Money from sale of property	$480,968.75	
(Using language of witness)		
"That left"	142,907.00	
"Represented by interest".	104,000.00	
"Leaving from former surplus"	38,570.00	
Accounting for entire surplus		$623,875.75
		$984,000.00

This was the attempt of this Company to make disclosure of its entire business, this was the company's explanation of the source from which the money it paid in dividends was derived. The statement is complete and takes care of all the receipts and expenditures from 1902 to 1912. The receipts balance with the dividends. The first thing to disturb this balance is the admission on cross-examination that the receipts were $30,000 in excess of those originally shown on the "Exhibit "S," the corrections in ink being made afterwards. R. 290. The greater disturbance resulted when Company admitted a surplus of $166,000, R. 317. This surplus whilst admitted, is not accounted for in any manner, and the Company never even attempted to account for it. It must be assumed that the same was additional unaccounted for receipts, and the failure of Company to consider it when making a statement of its business on "Exhibit S" only strengthens our claim that the business of this Company was not disclosed. On top of this a medley of contradictions appears that would baffle the most expert accountant. The Company, R. 290, accounts for a cash balance at the end of the year 1911,

$924.37, and that the Company owed the Union Natural Gas Corporation $74,212.21. R. 291. Finally, that the Union Natural Gas Corporation owed the Company, and that the surplus was $166,353.13, R. 291, which was first claimed that The Newark Coke Company was included in this surplus, R. 291, and afterwards that this company was not included, R. 291. To what year or years this surplus must be credited is purely a matter of conjecture on our part, but should have been a matter of proof on the part of the Company. That it should have been accounted for is obvious and manifest.

(2) The Company on Oct. 4th, 1904, R. 341, paid a dividend of $180,000.00. "Exhibit S" shows that the expense of operation for those three years amounted to $96,440.26; the gross receipts during the same years amounted to $258,831.28, added to that were interest receipts in the amount of $14,955.68, making the total net receipts $177,346.70. Now, it is claimed by the Company and insisted upon that the betterments were additional expenditures. "Exhibit S." The total amount of the betterments for those years was $44,484.48, so that the net amount available for dividends at the end of the year 1904 would have been $132,862.22. "Exhibit S." This calculation is only approximately correct, as the earnings for October, November and December of 1904 are included and the expenses for those months deducted. The amount really available on October 4th, when this dividend was paid would be considerably less than the figures herein stated, as the average monthly receipts are far in excess of average monthly expenditures. It is obvious that the dividend of $180,000 could not have been

paid from the net earnings of the company, unless the amount claimed to have been paid for betterments was a part of the cost of operation and only arrived at by an analysis of the cost of operation. That is, the company spends a certain amount of money each year, a certain part of which is charged to betterments and the balance to operation. What the Company seeks in this matter is (a) to add betterments to cost of operation, (b) have betterments deducted from net profits each operation reducing the per cent of net profits. That this must be so, explains, and nothing else can explain, the surplus of $166,353.13 which the Company admits that it has. (c) adding betterments each year to the plant thereby again reducing the amount of net return. No explanation was ever made or attempted to be made of this operation. The payment of such a dividend in the face of the figures appearing on "Exhibit S" is not only improbable, but was impossible unless the same was charged as a part of the operating expenses of said Company. That the dividend was paid cannot be denied as the vouchers for the same are in evidence. The fault lies in what the Company has attempted to claim without any foundation or predicate for its claims. The court can easily verify this transaction from the figures appearing on "Exhibit S."

(3) According to "Exhibit S" the Company started in business in 1902 with an investment of $700,993.52, and this investment was made up of three items: field, main line, and city plant. Fictitious values were added to both the city plant and the field, the Company after its inventory of 1902 increased was added the value of the field $219,793.64 and $60,000.00, "Exhibit B.

B. B.," R. 62, to the city plant. So that $279,-793.64 was added to the inventory for intangible values and the amount of the inventory less these intangible or fictitious values would be $421,199.88. These values were carried from that time on being increased from year to year with the amount of betterments made. The Company also charges itself with investment in field to 1905, and main line to 1909, when both field and main line were sold in 1905. The obvious purpose of carrying main line to 1909 being to affect the rate of return during those years.

Taking the statement of the Company that it paid in dividends from 1902 to 1912, $984,000 in dividends and had a surplus of $166,353.13 we find that this Company had money in its possession from which it could have been paid in dividends in the amount of $1,150,353.13, or approximately $115,000 a year. It may be contended that a large part of this money was derived from the sale of property of the Company, and we may add as an answer thereto that this property was also a part of the profits of operation paid for by them and taken in dividends mediately and not immediately. So that for ten years this Company averaged considerably more than 100% per annum on the amount of its capital stock, $81,600. There is no evidence in this case of any money borrowed that was not paid back, but the evidence does show that in addition to the large dividends paid, this Company increased its original investment from $81,600 to $302,000, "Exhibits S." The amount of the investment shown in addition to the original investment all came from profits of the Company, which

also should be considered in arriving at the actual profits earned from the sale of gas. That the money earned by the Company is used to increase its investment in lieu of paying dividends amounts to and is the cognate act of the Company placing its dividends at interest, which is nothing more than another form of investment. All companies pay dividends upon their capital stock, and that is why this Company on Oct. 4, 1904, paid a dividend of 220 30/51%, R. 341, and that is why the Company in 1909 paid a dividend of 250%, R. 341 and 342. Disregarding all profits shown by this Company from 1898 to 1902, and distributing the profits from 1902 to 1912 over all the years from 1898 to 1912, the average yearly dividends would amount to $82,140.00, which again would show a profit of more than 100% on the original investment of $81,600. So that the showing of the Company appearing on "Exhibit S," does not present the facts of the case as they actually exist. These facts however, have reference to the financial history of the company, rather than present conditions. The past history of the company becomes important in ascertaining whether the Company is entitled to the consideration of a higher rate in order to compensate it for a rate that might have been inadequate. A company that shows an average annual profit of more than 100% for fourteen years can make no complaint concerning the inadequacy of former rates, and should not be entitled to any consideration on account of the hazardous nature of the enterprise, when the facts indicate from the enormous profits derived that all hazard has been compensated for, by the dividends received over and above the amount invested in the public service.

EXHIBITS OF THE LOGAN NATURAL GAS AND FUEL COMPANY.

It must be borne in mind that the Logan Natural Gas and Fuel Company was not a party to this suit, and that by reason thereof the city has no opportunity of examining the books nor the property of the Logan company in order to ascertain the correctness of the figures presented to the court. This court will not have to give more than a passing consideration of the exhibits presented by the Logan company to arrive at a proper conclusion. The history of the Logan case is one of the fairy tales of modern finance. Starting in business in 1894 with a capital stock of $40,000 it paid cash dividends from 1902 to 1912 of $4,760,000 "Exhibit U." What dividends were paid from 1894 to 1902 is not in evidence, but we are safe in venturing the opinion that they were enormous. The capital stock of the Logan company remained unchanged from 1894 until 1911, the year in which this suit was commenced when the same was increased by a stock dividend to $10,000,000.00. The increase in stock, being nothing more nor less than a stock dividend—the division of the shares into smaller shares, and thereby reducing the rate of return. In 1904 this company paid a dividend of 900% (Exhibit U); in 1905, 1000%; in 1906, 3000% & etc. The apparent showing of this company is that it started in business in 1894 with a capital stock of $40,000.00, paid $4,760,000.00 in dividends from 1902 to 1912, and accumulated an investment of $10,837,-852.37 clear of all indebtedness. This statement in it-

self is sufficient answer to any and all the contentions of the Newark company on behalf of the Logan company. An examination into exhibits of the Logan company designed to confuse rather than enlighten, becomes at once unnecessary and unprofitable. In arriving at a proper estimate of what the Logan company earned, the enormous investment accumulated by this company must be considered as a part of its profits. It is certainly in point to ask whether or not a cost of production theory figured on the basis on an immense surplus that is wholly the contribution of the public, should receive serious consideration. Not only was the cost of production figured upon this basis but the profit and depreciation allowances were made therefrom so that the apparent rate of return as shown by "Exhibit U" for 1911 of .108% is so manifestly and palpably incorrect that it the same is not deserving of consideration. The average dividend as shown by "Exhibit U" from 1902 to 1912 was .12165% per year, a proposition viewed in the light of the dividends of $4,760,000 paid in actual money, that is so prepostorous that no reliance can be placed on any of the evidence advanced by this Company. We will take occasion to point out to the court some of the inaccuracies that appear on the exhibits offered by this Company, not that we regard their consideration as being necessary in arriving at a proper conclusion, but more for the purpose of informing the court, lest it be deceived by them, and accept these exhibits for their face value. We will not attempt to explain these inaccuracies. No explanation appears in the record.

(a) The total production of the Logan Natural Gas and Fuel Company from 1902 to 1912 as shown by "Exhibit R," first line, was 77,305,460,000 thousands cubic feet of gas. The average cost of operation as shown by "Exhibit P," fourth line, is .0673. The total cost of operation as shown by "Exhibit U," seventh line is, $10,739,873.13. The total cost of production reckoned from the average cost would be $5,202,657.05. So that there is added to the cost of production as shown on "Exhibit U" the sum of $5,395,434.15. Why this variance should exist does not appear.

(b) The total amount of gas produced in 1911, was 8,295,283 thousands cubic feet, "Exhibit P," first line. The total gas receipts by the Logan company for the same year amount to $3,005,215.89, "Exhibit U," fourth line. If these amounts are correct the Logan Gas company received an average price of .3638 cents per thousand cu. ft. The average price shown on "Exhibit Q," for 1911, last line, was .1749. It is evident from these figures that considerably more than half of the gas sold by the Logan company is purchased by it, and nowhere in the record is there any showing what the Logan company pays for the gas it purchases and sells.

(c) Again, the total gas production of the Logan company for 1911 was 8,259,283 thousands cubic feet, "Exhibit R," first line. The average price claimed to have been received by the gas company for all the gas it sold was in the same year, .1749 cents per thousand cubic feet, "Exhibit Q," last line. If this be true the Logan company would have received the sum of $1,444,643.59, when as a matter of fact it received the sum of $3,025,-729.50, "Exhibit U," fourth line. Indicating again that

the Logan company produced less than half the amount of gas that it sold, assuming that the gas cost as much by purchase as it does by production. We claim that we have a right to know what the Logan company pays for the gas it purchases. The City has the right to the benefit or disadvantage of the price paid. The court must know what this price is and the knowledge of it is just as essential for a proper solution of the matters at hand as is the cost of production. If the Logan company produced no gas, the cost of production would not be involved, and evidence of what it cost other companies to produce gas would be clearly irrelevant. Producing as it does, as is clearly indicated less than half the gas it sells, the disclosure of what it claims to produce, and the failure to disclose the cost of the gas it purchases, leaves but little room for doubt but that the gas purchased is bought at a considerably less figure.

(d) Again, the total expenditure claimed to have been made by the Logan company in 1911 were, $1,904,-799.37, "Exhibit U," 7th line. The total cost of gas in the fields as shown by "Exhibit P," 4th line for the same year was .1061 per thousand cu. ft., so that the total expenditures claimed by the Logan company does not represent the cost of production, as this item should appear as being $876.309.92. Allowing .0513 cents per thousand cu ft., as shown on "Exhibit U," 2nd line, for betterments, or the sum of $424,320.03, and allowing .0403 per thousand cu. ft., as shown by "Exhibit P," 3rd line, or the amount it represents, $332,849.10, and there still remains unaccounted for the sum of $271,320.-37, or .0328 per thousand cu. ft. We can advance no explanation for this apparent variance.

(e) Again, the total amount of gas produced by the Logan company in 1911, was 8,202,291 thousands cu. ft., the total cost of gas in the field including production, depreciation and profit amounted to .2001 cents per thousand cu. ft., "Exhibit P," last line. The total expenditures of this company for the same year amounted to $1,904,799.37. The amount of gas just stated at .2001 cents per thousand cu. ft., would amount to $1,652,-682.53, showing an excess of expenditures of $262,116.84. There is no explanation and no apparent reason for this discrepancy.

(f) Again, the total production of gas for the year 1911, was 8,259,283 thousand cu. ft. The cost of operation for the same year was $1,904,799.37. The cost of production obtained from these figures would be approximately .23 cents per thousand cu. ft. The cost of production as shown by "Exhibit P," for same year (fourth line) was .1061 cents per thousand cu. ft. What these discrepancies and varianecs mean are matters of conjecture purely. They prove conclusively that no reliance can be placed on the figures and exhibits offered in evidence by the Logan company.

In conclusion, we think that any value placed upon the plant in excess of $300,000 would be excessive. That the net profits of the company on this valuation would appear to be approximately 15%. Assuming the correctness of all the contentions of the company as to the valuation of the plant and deducting therefrom the sum of $33,379 for pavement over mains which this court refused to allow in the Des Moines case, the company earned 11% in 1911. That is the case of the company in its broadest extension. Whether these companies are

separate or distinct entities can make but little difference in the conclusion reached, as there is a failure of proof on the part of both companies of not submitting the cost of production, cost of purchase or any of the necessary matters involved in their operations during the years, 1912, 1913 and 1914. There is a total failure of proof in the matter of the valuation of the property of the Logan company involved in production of gas. If these companies are united, the value of all property used in the production, transportation and distribution of natural gas becomes the most important factor in arriving at the cost of production. The failure of proof in all these matters is a failure of proof in reference to the most vital questions involved in this case. We are forced to the conclusion that evidence concerning confiscation which this court has said, must be clear, convincing and satisfactory is met by a total failure of proof.

Respectfully submitted,

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